# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION


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# DECISIONS

Commission Decisions



Administrative Law Judge Decisions

JANUARY 1989

Review was granted in the following cases during the month of January:

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 88-176. (Judge Merlin, November 28, 1988)

Secretary of Labor, MSHA v. Lincoln Sand & Gravel Company, Docket No. LAKE 88-67-M. (Judge Maurer, December 8, 1988)

Review was denied in the following case during the month of January:

Ernie Bruno v. Cyprus Plateau Mining Corporation, Docket No. WEST 88-157-D. (Judge Morris, November 29, 1988)

# COMMISSION DECISIONS

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 10, 1989

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| EMERY MINING CORPORATION and UTAH POWER AND LIGHT COMPANY | ) | DOCKET NOS. WEST 87-130-R THROUGH -137-R |
| | ) | WEST 87-144-R |
| v. | ) | THROUGH-147-R |
| | ) | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | ) | WEST 87-150-R |
| | ) | WEST 87-152-R |
| | ) | WEST 87-153-R |
| and | ) | WEST 87-155-R |
| | ) | THROUGH 161-R |
| UNITED MINE WORKERS OF AMERICA (UMWA) | ) | WEST 87-163-R |
| | ) | WEST 87-243-R |
| | ) | THROUGH -249-R |
| | ) | WEST 87-208-R |
| | ) | WEST 87-209-R |
| | ) | WEST 87-25 |

DIRECTION FOR REVIEW AND ORDER

On November 19, 1988, the Secretary of Labor filed a petition for interlocutory review of an order issued August 30, 1988, wherein the presiding administrative law judge granted the petition of Utah Power and Light Company ("UP&L") to vacate 30 modified citations and orders to the extent that they named UP&L as a party.

On December 5, 1988, UP&L filed an opposition to the petition for interlocutory review arguing, among other things, that the subject order was not interlocutory but rather was a final order, reviewable only upon the timely filing of a petition for discretionary review in accordance with 30 U.S.C. Sec. 823(d)(2)(A)(i) and Commission Procedural Rule 70, 29 C.F.R. Sec. 2700.70. See UP&L Opposition at 6.

On December 19, 1988, the Secretary filed a reply to UP&L's opposition, arguing that the subject order was not a final decision because the requirements of Rule 54(b) of the Federal Rules of Civil Procedure were not met. 1/ Specifically the Secretary stated that:

> The August 30 Order contains no express determination that there is no reason for delay or express direction for the entry of final judgment as to Utah Power and Light.

Sec. Reply at 3.

In Local Union 1889, District 17, United Mine Workers of America v. Westmoreland Coal Co., 5 FMSHRC 1407, 1411-12 (August 1983), pursuant to Commission Procedural Rule 1(b), 29 C.F.R. Sec. 2700.1(b), we applied Rule 54(b) in the context of an adjudication of fewer than all claims presented in an action. 2/ We find that Rule 54(b) is equally applicable in the context of adjudications involving multiple parties. We concur in the statement in 10 Wright, Miller, & Kane, Federal Practice and Procedure, Sec. 2654 at 38 (1983) (footnotes omitted):

> The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much-needed certainty in determining when a final and appealable judgment has been entered. As stated by one court, "if it does choose to enter such a final order, [the court] must do so in a definite, unmistakable manner." [David v. District of Columbia, 187 F.2d 204,206 (D.C. Cir. 1950).] Absent a certification under Rule 54(b) any order in a multiple-party or multiple-claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.

See also, Huene v. United States , 743 F.2d 703, 704 (9th Cir. 1984).

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1/ The Secretary's Motion to File Reply Memorandum is hereby granted.

2/ Rule 1(b), 29 C.F.R. Sec. 2700.1(b) states:

> Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. Secs. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

In the case at bar, the parties clearly have differing views as to the effect of the order intended by the administrative law judge. Accordingly, we hereby grant the petition for interlocutory review for the limited purpose of remanding this matter to the administrative law judge for an expeditious determination of whether a certification of finality in accordance with Rule 54(b) is appropriate. After the judge clarifies the nature of his dismissal on remand, we will issue a further appropriate order concerning the Secretary's petition for interlocutory review. Pending issuance of such an order by the Commission, all time requirements are hereby stayed.

Accordingly, we hold in abeyance our ruling on the Secretary's petition, and we retain jurisdiction pending the judge's determination on remand.

FORD B. FORD, Chairman

RICHARD V. BACKLEY, Commissioner

JOYCE A. DOYLE, Commissioner

JAMES A. LASTOWKA, Commissioner

L. CLAIR NELSON, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 12, 1989

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket Nos. KENT 86-94-R |
| | : | KENT 86-95-R |
| PEABODY COAL COMPANY | : | KENT 87-154 |

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

## DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), the issue presented is whether Commission Administrative Law Judge William Fauver erred in determining that Peabody Coal Company ("Peabody") violated 30 C.F.R. § 75.1710-1 by not equipping certain mobile bridge carriers ("MBC") with cabs or canopies. 9 FMSHRC 945 (May 1987)(ALJ). 1/ On the bases that follow,

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1/ 30 C.F.R. § 75.1710-1, which implements the statutory cab and canopy standard, 30 U.S.C. § 877(j), requires installation of cabs or canopies on "self-propelled electric face equipment." Section 75.1710-1(a) states in pertinent part:

> Canopies or cabs; self-propelled electric face equipment; installation requirements.
>
> [A]ll self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine ... shall, in accordance with the schedule of time specified in paragraphs (a)(1), (2), (3), (4), (5), and (6) of this section, be equipped with substantially constructed canopies or cabs, located

we conclude that the judge's finding of violation is supported by substantial evidence and is legally correct in result. Accordingly, we affirm.

Peabody owns and operates the Camp No. 11 Mine, a large underground coal mine located near Morganfield, Kentucky. The mine is part of a complex employing 1,000 people and producing 4.1 million tons of coal annually. In three of the mine's five operating sections, coal is mined using continuous mining machines and shuttle cars. In the other two operating sections, a "continuous haulage system" is used. Coal is loaded directly from the continuous miner onto a series of haulage belts contained in a mobile haulage system, eliminating the need for shuttle cars. This mining process results in offset crosscuts at angles of approximately 60 degrees. 2/

When the continuous haulage system is in use, coal cut by the continuous mining machine is dumped from the machine's tailpiece onto the first piggyback conveyor, where an electrically powered conveyor belt transports the coal along the piggyback's conveyor and onto the first MBC. The MBC contains an electrically powered conveyor belt that transports the coal to the second piggyback conveyor. The coal subsequently passes to the second MBC and then to the third piggyback conveyor. From the third piggyback conveyor, the coal is transferred by a dolly to the panel conveyor belt and is transported out of the mine. The continuous miner, piggyback conveyors, and MBCs are equipped with slot devices through which pins are inserted to hook the components together. These components may be connected and disconnected, and are usually disconnected and moved between mining cycles.

Each MBC is equipped with an electric motor that drives its conveyor belt and another electric motor that moves the MBCs forward and backward on caterpillar tracks. The movement of the MBCs allows the continuous haulage system to adjust to the movement of the continuous mining machine without disrupting transportation of the coal. Each MBC is approximately 30 feet long and is operated by a miner using controls located approximately 20 feet from the MBC's inby end (the end nearer the face). The chief duty of the operator of the first MBC is to keep the piggyback conveyor aligned with the tailpiece of the continuous miner in order to assure the proper movement of the mined coal. Since 1978, MBCs without protective cabs or canopies have been used as components of the continuous haulage system at the mine and, prior to the issuance of the citations in question in 1986, had not been cited as being in violation of section 75.1710-1.

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> and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls. ...

2/ A "crosscut" is a passageway or opening driven between and across mining entries for ventilation and haulage purposes. Bureau of Mines, U.S. Dept. of the Interior, Dictionary of Mining, Mineral, and Related Terms 280 (1968)("DMMRT").

On March 3, 1986, James Hackney, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the No. 6 section of the mine, a continuous haulage system section. He observed the two MBCs being operated without protective cabs or canopies. Hackney issued to Peabody a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 75.1710-1. On March 5, 1986, he inspected another continuous haulage system in the mine's No. 1 section, where he observed the first MBC in the system being operated without a cab or canopy. Hackney issued to Peabody another section 104(a) citation alleging a violation of section 75.1710-1.

Peabody contested the citations and the Secretary's proposed penalty assessments for the alleged violations. Before Judge Fauver, the parties agreed that the cited MBCs were not equipped with cabs or canopies at the times of citation and that the MBCs were self-propelled electrical equipment.

The judge, stating that an MBC is self-propelled and electrically operated, regarded the controlling issue to be whether an MBC was electric face equipment. 9 FMSHRC at 947. The judge noted that the cab/canopy regulation does not contain a definition of the equipment to which it applies. In agreement with the parties' mutual position at the hearing (Tr. 14-16), however, he found that the "permissibility" definition contained in 30 C.F.R. § 75.2(i) supplied "a practical line of demarcation." Id. 3/ That section provides in relevant part that equipment permissibility within the context of "electric face equipment" pertains to "all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine...." Viewing face equipment as equipment used in or inby the last open crosscut, the judge focused on the meaning of "last open crosscut," a term not defined in the Mine Act or the Secretary's regulations. 9 FMSHRC at 948.

In construing that term, the judge rejected the testimony of

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3/ 30 C.F.R. § 75.2(i) repeats section 318(i) of the Mine Act, 30 U.S.C. § 878(i), and states in part:

> "Permissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories are designed, constructed, and installed in accordance with specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire and the other features of which are designed and constructed in accordance with the specifications, of the Secretary, to prevent, to the greatest extent possible, other accidents, in the use of such equipment....

Peabody's witness, Mine Superintendent Charles Jernigan, that the last open crosscut is the area between, but not including any portion of, the mine entries. 9 FMSHRC at 948. Instead, the judge found "reliable and accurate" the testimony of MSHA's Assistant District Manager David Whitcomb, that the last open crosscut is the last open, continuous line along which the air yentilating a working section circulates. 9 FMSHRC 945. 4/ Based on Whitcomb's testimony, the judge found: "The last open crosscut ... [is] defined by the flow of air across the section, [and] includes not only the openings between the entries but across the intersections and that part of an entry inby an intersection to the point of the next intersection inby. That is, the last open crosscut follows the air flow across the entries of the working section." 9 FMSHRC at 946.

Applying this description to the evidence, the judge determined that the operator's compartment of the first MBC enters the last open crosscut during mining operations. 9 FMSHRC at 949. The judge held that "since the first MBC operator's compartment enters the last open crosscut, it is required to have a cab or canopy under [section] 75.1710-1." Id. The judge rejected the Secretary's argument that the continuous haulage system is a "single unit," and that application of the standard to the first MBC in the unit therefore brings the second MBC in the system within the reach of the standard. 9 FMSHRC at 949. The judge stated:

> The test of applying ... [section 75.1710-1] is whether the equipment operator's compartment is subject to being used in or inby the last open crosscut. It would stretch the standard too far to hold that the second MBC [in the continuous haulage system], which is far removed from the last open crosscut, should be considered "face equipment" solely because the front part of the continuous haulage system is in or inby the last open crosscut.

Id.

The judge assessed token civil penalties of $1.00 for each violation, noting that "the cases involve a novel haulage system that raises a question of first impression," and that Peabody had made a good faith test of its interpretation of section 75.1710-1 as applied to the continuous haulage system. 9 FMSHRC at 949.

We granted Peabody's petition for discretionary review, which asserts essentially that the judge erred in his description of last open crosscut and, hence, in holding that the first MBC in each continuous haulage system is subject to the cited standard. We also directed for review an issue raised by the Secretary -- whether the judge erred in

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4/ "Working section" (often referred to as "section") means a working area of a coal mine, from a loading point to and including a working face. See 30 U.S.C. § 878(g)(3); 30 C.F.R. § 75.2(g)(3); DMMRT 979. (See n.7 infra for the definition of "working face.")

concluding that the continuous haulage system should not be viewed as a single unit for purposes of applying section 75.1710-1.

While neither the statutory cab/canopy standard nor section 75.1710-1 contains a definition of the equipment that it covers, we conclude that, as the parties agree and as the judge found, section 75.2(i)(n. 3 supra) affords a "practical line of demarcation." That provision, in defining "permissible" as applied to "electric face equipment," describes the latter class of equipment as "electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine...." (Emphasis added.) 5/ The key question thus becomes the application of the term "last open crosscut" to the mining configuration used by Peabody.

Although "last open crosscut" is not defined in the Mine Act or the Secretary's regulations, the Act and regulations contain repeated references to the term. 6/ As noted, a "crosscut" is a passageway or opening driven across entries for ventilation and haulage purposes. In general, the last open crosscut thus refers to the last (most inby) open passageway between entries in a working section of a coal mine. 7/ The last open crosscut "is an area rather than a point or line...." Henry Clay Mining Co., 3 IBMA 360, 361 (1974). Under the facts presented, the judge determined that the specific boundaries of this area are demarcated by the air flow across the developing entries of a working section and include the crosscuts (openings) between entries, the contiguous intersections of the entries and crosscuts, and those portions of the entries inby such intersections. We conclude that this description, considered from a general standpoint and as applied to the

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5/ A standard definition of "face equipment" similarly provides in relevant part:

> Face equipment is mobile ... mining equipment having electric motors ... normally ... operated inby the last open crosscut in an entry or room.

DMMRT supra, at 407.

6/ See, e.g., section 303 of the Act, 30 U.S.C. § 863, and 30 C.F.R. § 75.301 et seq. (ventilation requirements), and section 305 of the Act, 30 U.S.C. § 865, and 30 C.F.R. § 75.501 et seq. (permissibility requirements for electrical equipment). (These statutory provisions, including their references to last open crosscut, were carried over from the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977).)

7/ "Working face" is "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle...." 30 U.S.C § 878(g)(1); 30 C.F.R. § 75.2(g)(1). See also DMMRT 407, 1244 (definitions of "face" and "working face"). The area inby the last open crosscut (i.e., between the last open crosscut and the working face) is referred to as the "working place." 30 U.S.C. § 878(g)(2); 30 C.F.R. § 75.2(g)(2).

mining configuration in question, comports with commonly accepted mining terminology and is supported by substantial evidence of record. 8/

MSHA's witness Whitcomb stated that the last open crosscut is "the last continuous line the air passes through going across the [run] from one side of the entry to the other." 9/ Whitcomb described the boundary at which the last open crosscut begins as the location of the check or back-up curtains, adding that "anything inby that location would have to be maintained permissible." Tr. 274, 276. 10/ Peabody's witness Jernigan did not dispute Whitcomb's views regarding the outer boundary of the last open crosscut area. However, Jernigan indicated on direct examination that the last open crosscut includes only the crosscuts, i.e., the passageways roughly parallel to the working face, but not the intersections of crosscuts and mine entries, or any portion of mine entries. Tr. 163-166, 198-200. As the judge stated, however, this interpretation is illogical because it makes the area inby the last open crosscut "the middle of a solid block of coal." 9 FMSHRC at 948. As Jernigan himself agreed on cross-examination, the last open crosscut is "where the air travels through on the intake and exhaust system." Tr. 163. Entries and intersections of crosscuts and entries are ventilated by air travelling through the intake and exhaust system. Indeed, the air must travel through those areas in order to pass along the crosscuts adjacent to the face.

The interpretation offered by Whitcomb and accepted by the judge

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8/ We recognize that in any given coal mine, the mining methodology used may uniquely determine the last open crosscut. Thus, we must leave to future cases any descriptive refinements necessitated by other particular mining configurations.

9/ With respect to this portion of Whitcomb's testimony, the judge noted:

> Although the court reporter transcribed the word "drum" at this point, I find that Mr. Whitcomb actually said "run" and the reporter made an error in transcription. "Run" as used by Mr. Whitcomb refers to the distance from the Number 1 to the Number 5 entries, that is, the full expanse of the coal faces being developed....

9 FMSHRC at 948 n.1.

10/ Check curtains, used to provide ventilation to the working faces, are overlapping strips of heavy, fire-resistant material serving as temporary stoppings and positioned to hold the air flow along face areas. See DMMRT at 292 (definition of "curtain"); see also S. Cassidy (ed.), Elements of Practical Coal Mining 212-213, 220 (1973). 30 C.F.R. § 75.302(b)(2) states that check curtains required under the mine's approved ventilation plan "shall be so installed to minimize air leakage and permit traffic to pass through without adversely affecting ventilation."

is fully consistent with the use of the term in other portions of the Mine Act and the Secretary's mandatory standards. For example, 30 C.F.R. § 75.301, which repeats section 303(b) of the Act, 30 U.S.C. § 863(b), requires in part that "[t]he minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute." It would be absurd to require maintenance of 9,000 cubic feet of air per minute only in those crosscuts when the hazards alleviated by providing the required ventilation are also present in the intersections of those crosscuts and entries. In like manner, the permissibility requirements of 30 C.F.R. § 75.500, et seq., based on 30 U.S.C. § 865, apply to specified electrical equipment located in or taken inby the last open crosscut.

Thus, we conclude that an MBC is "self-propelled electric face equipment" within the meaning of the cited standard if it is taken into the last open crosscut as described herein. Substantial evidence supports the judge's finding that the first MBCs were so used at Peabody's mine.

Using exhibits depicting the location of the continuous haulage system during mining operations, Whitcomb testified that given the length of the pillars and of the continuous haulage system units, the first MBC operator's compartment entered the last open crosscut. Tr. 252-69; Exhs. G-10, 11, & 12; R-11 & 12. Whitcomb's testimony is consistent with the exhibits depicting the continuous haulage system as used in the mine. In addition, the MSHA inspector who issued the contested citations testified without dispute that he had observed the operators of the first MBCs in the last open crosscut, and his explanation of what constitutes the last open crosscut was consistent with Whitcomb's description of that area and with the definition adopted by the judge. Tr. 32, 36. In light of this evidence, we conclude that the judge properly held that Peabody violated section 75.1710-1 by using the cited first MBCs in the continuous haulage systems without cabs or canopies.

Although we agree with the judge that Peabody violated section 75.1710-1, we reject his premise that the violations were established only because "the first MBC operator's compartment enter[ed] the last open crosscut." 9 FMSHRC at 949 (emphasis added). Given the continually changing dynamics of a working section, determining compliance with section 75.1710-1 based on the precise location of the operator's compartment invites confusion in both compliance and enforcement. Once any portion of an MBC enters an area inby the last open crosscut, it is properly classified as face equipment requiring a cab or canopy.

The judge also concluded that the second MBC in the continuous haulage system of the No. 1 section was not subject to section 75.1710-1. He observed that it "would stretch the standard too far to hold that the second MBC, which is far removed from the last open crosscut, should be considered face equipment solely because the front part of the continuous haulage system is in or inby the last open crosscut." 9 FMSHRC at 949. Although we granted the Secretary's request for review

of the judge's conclusion in this regard, the Secretary has not further argued the issue in her brief on review. To the contrary, the Secretary now asserts that the second MBC is subject to the standard if it is used in the first MBC position. S. Br. 10 & n.4. Given these facts, we find it unnecessary to decide whether the lack of a cab or canopy on the second MBC in the No. 1 section violated section 75.1710-1. Finally, we reject Peabody's argument that the Secretary was estopped from citing the continuous haulage system because the system had not been cited previously. See, e.g., Emery Mining Corp. v. Secretary, 744 F.2d 1411, 1416 (10th Cir. 1984); King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981).

On the foregoing bases, we affirm the judge's decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 12, 1989

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| CHARLES CONATSER | : | |
| | : | |
| v. | : | Docket No. KENT 87-168-D |
| | : | |
| RED FLAME COAL COMPANY, INC. | : | |
| | : | |

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Charles Conatser alleges that Red Flame Coal Company, Inc. ("Red Flame") violated section 105(c)(1) of the Mine Act when it discharged him for refusing to drive a rock truck. 1/ Commission

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1/ Section 105(c), 30 U.S.C. § 815(c), provides in relevant part:

> Discrimination or interference prohibited; complaint; investigation; determination; hearing
>
> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner ... of any statutory right afforded by this [Act].
>
> (2) Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon

Administrative Law Judge George A. Koutras dismissed Conatser's discrimination complaint on the grounds that Conatser failed to communicate his belief in the existence of a safety hazard to Red Flame's foreman at the time of his work refusal. 10 FMSHRC 416 (March 1988)(ALJ). For the reasons that follow, we affirm the judge's decision.

Conatser was employed by Red Flame at its strip coal mine on Whitco Mountain in Letcher County, Kentucky, as a general loader operator from July 14, 1986, through the date of his discharge on January 26, 1987. In that capacity, Conatser operated an end loader, a heavy vehicle resembling a tractor and equipped with a loading bucket. Conatser had been transferred to the Red Flame mine by No. 8 Limited of

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> receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint.... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance....
>
> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance....

Virginia ("No. 8 Limited"), a parent corporation of Red Flame for whom he had worked in the same capacity for a period of some seven years. While employed at the No. 8 Limited mine, Conatser had driven rock trucks on several occasions. (Rock trucks are heavy haulage vehicles with empty weights ranging from 50 to 85 tons.)

At approximately 7:00 a.m. on January 26, 1987, Conatser reported for work at Red Flame and was advised that his end loader was inoperable. There were 10 to 12 inches of snow on the ground and Red Flame's foreman, Zachary Mullins, was having the haulroads scraped to remove the snow. Mullins directed Conatser to assist Red Flame's mechanic in starting up some heavy equipment. While Conatser was so occupied, Mullins radioed the mechanic and directed him to start up an 85-ton WABCO rock truck.

Mullins drove up to the WABCO rock truck and motioned Conatser over. Mullins then instructed Conatser to drive the rock truck that day. Conatser responded, "I can't drive a rock truck." 10 FMSHRC at 466-67; Tr. 75, 116, 497-98. Mullins then told Conatser that "Roy, Clifford, Robert and Larry" -- other miners at Red Flame -- had all learned to drive a rock truck and that Conatser could drive. Tr. 75, 423; Mullins Dep. 27-28; Exhibit R-2. When Conatser again told Mullins that he could not drive the truck, Mullins told Conatser either to drive it or "go to the house." 2/ Conatser responded that Mullins was forcing him to go to the house. Conatser then asked Mullins to get his steel-toed safety shoes for him, which were in Conatser's loader, and Mullins told Conatser to pick them up on his way out. Conatser left the mine site. Later that same day, Conatser filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been discharged by Red Flame in violation of section 105(c) of the Mine Act.

On the advice of MSHA, Conatser subsequently contacted Wesley Burke, No. 8 Limited's president, and on February 27, 1987, met with Burke and Cruce Davis, Red Flame's mine superintendent, to ask for his end loader job back. At that time, Conatser advised management that he had refused to drive the rock truck because he feared for his safety as he did not know how to "gear down" a rock truck on a slope and because he had never driven a rock truck under wet weather conditions. When Conatser called Burke a week later to find out whether Red Flame would rehire him, Burke informed Conatser that he would not be rehired.

After investigating Conatser's complaint, which alleged in essence that he was discharged after refusing to operate a rock truck that he lacked experience to drive, MSHA advised Conatser on May 22, 1987, that the information received during its investigation did not establish a

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2/ Both the Commission and the Sixth Circuit Court of Appeals agree that this language is synonymous with a discharge in the mining industry. See, e.g., Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982), aff'd sub nom. Whitley Development Corp. v. FMSHRC, No. 84-3375, slip op. at 2 (6th Cir. July 31, 1985); Secretary on behalf of Keene v. S&M Coal Co., 10 FMSHRC 1145, 1147 n.5 (September 1988).

violation of section 105(c) of the Mine Act. On June 8, 1987, Conatser, proceeding without counsel, filed his own discrimination complaint with the Commission pursuant to section 105(c)(3) of the Act (n. 1 supra). He subsequently retained counsel to represent him before this Commission.

Following an evidentiary hearing, Judge Koutras issued a decision dismissing Conatser's complaint. The judge first determined that Conatser's refusal to drive the rock truck on January 26, 1987, was based on a reasonable, good faith belief in a safety hazard. 10 FMSHRC at 457-62. In this regard, he found that the condition of the haulroads at the Red Flame mine on January 26, 1987, "presented ... possible sliding and slipping hazards for the [rock] trucks" scheduled to operate on the haulroads that day. 10 FMSHRC at 457-59. The judge found that although Conatser operated rock trucks on some seven occasions at the No. 8 Limited strip site, he had driven them only on level terrain during dry weather conditions. 10 FMSHRC at 459-60; Tr. 61-62, 65-66, 70, 94-97, 515-516, 520. The judge concluded that Conatser's refusal to drive the rock truck on January 26, 1987, was reasonable in light of his relative inexperience in operating rock trucks, the fact that he had never driven a rock truck on a wet hill or roadway, and the potentially hazardous nature of the roadway over which he was expected to drive on that date. 10 FMSHRC at 459-61.

Considering next whether Conatser had communicated his safety concerns to Mullins, the judge found that Conatser simply responded to Mullins' instruction to drive the rock truck with the statement "I can't drive a rock truck." 10 FMSHRC at 466-67. Based upon Conatser's prior experience, however, the judge found that this statement was not true. 10 FMSHRC at 467. The judge further found that Conatser in no way communicated his safety concerns to Mullins at the time of his work refusal. 10 FMSHRC at 467-68. The judge expressly rejected Conatser's argument that his brief statement was sufficient by itself to raise a safety issue, declining to read into that statement the various reasons subsequently asserted by Conatser in his written statement to MSHA and in his testimony at the hearing for refusing to operate the rock truck that day. Id.

The judge also found credible testimony by Mullins that if Conatser had told Mullins that he feared for his life or safety, or even given Mullins a reason for not driving the rock truck, he would not have required Conatser to drive the truck. 10 FMSHRC at 468; Tr. 400-01, 403-06. Davis' testimony that Mullins would have assigned the job to someone else if Conatser had informed Mullins of his safety concerns was also credited by the judge in concluding that Conatser's belief in the existence of a safety hazard was "in no way" communicated to Mullins at the time of his work refusal. 10 FMSHRC at 468; Tr. 484-86, 488. The judge determined from the testimony of Mullins, Davis and Red Flame miners that management at Red Flame took appropriate action to address communicated safety concerns and that because Conatser did not communicate his safety concerns to Mullins at the time of his work refusal, Mullins had no opportunity to understand the basis of Conatser's work refusal, to address Conatser's safety concerns, or to take any corrective action. 10 FMSHRC at 468.

The judge also considered Conatser's assertion that, because he was in shock due to Mullins' direction that he either drive the rock truck or go to the house, he had no opportunity to communicate to Mullins his reasons for refusing to drive the rock truck. The judge found that Conatser's claim of being in shock was difficult to believe. 10 FMSHRC at 468. Noting that Conatser conceded at the hearing that Mullins had not prevented him from speaking, the judge further found that Conatser had an ample opportunity to communicate his safety concerns to Mullins and that Conatser's failure to do so at the time of his work refusal was not excused by mitigating reasons or extenuating circumstances. 10 FMSHRC at 469. Accordingly, the judge concluded that because Conatser failed to communicate his safety concerns to Mullins, his work refusal was not protected under the Mine Act and his subsequent discharge by Red Flame for that work refusal was not in violation of the Act. Id.

Finally, the judge considered an allegation by Conatser that Red Flame's refusal to rehire him constituted a separate act of discrimination under the Mine Act. Finding no probative credible evidence to sustain this allegation, the judge summarily rejected this argument. 10 FMSHRC at 469-70. 3/

On review, Conatser essentially asserts that the judge erred as a matter of law in finding that Conatser's statement to Mullins at the time of his work refusal was insufficient to raise a safety issue. Arguing that the judge's finding was too restrictive, Conatser contends that his statement to Mullins, if evaluated in light of the evidence and the appropriate legal standard, clearly raised a valid safety issue at the time of the work refusal -- that Conatser was incapable of operating the rock truck under the conditions present at that time. Conatser also complains that certain findings of fact made by the judge are not supported by substantial evidence and should be reversed. We disagree.

The principles governing analysis of a discrimination case under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone and would have taken the adverse action in any event for the

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3/ No issue concerning Red Flame's refusal to rehire Conatser was raised by Conatser on review and, accordingly, that issue is not before us.

unprotected activity. Pasula, supra; Robinette supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1984); Donovan v. Stafford Constr. Co., 732 F.2d 954,, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp. 462 U.S. 393, 397-413 (1983)(approving a nearly identical test under the National Labor Relations Act).

A miner's refusal to perform work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); see also Simpson v. FMSHRC, 842 F.2d 453, 458 (D.C. Cir. 1988); Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366 (4th Cir. 1986). It is further required that "where reasonably possible, a miner refusing work should ordinarily communicate ... to some representative of the operator his belief in the safety or health hazard at issue." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982); see also Simpson v. FMSHRC, supra, 842 F.2d at 459; Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3rd Cir. 1987)(table cite).

Proper communication of a perceived hazard is an integral component of a protected work refusal, and the responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner. Dillard Smith v. Reco, Inc., 9 FMSHRC at 992, 995-96 (June 1987). Among other salutary purposes, the communication requirement is intended to avoid situations in which an operator at the time of a work refusal is forced to divine the miner's motivations for refusing work. Dillard Smith, supra, 9 FMSHRC at 995. We have also stated that the communication of a safety concern "must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used and the results, if any, that flow from the communication." Hogan and Ventura, supra, 9 FMSHRC at 1074.

In a well-reasoned analysis, the judge properly considered and applied relevant Commission and judicial precedent concerning work refusals. The primary issue presented on review is whether substantial evidence supports the judge's ultimate conclusion that Conatser failed to adequately communicate to Mullins his belief in the existence of a safety hazard. We find that it does.

In the context of the facts in this case, Conatser's statement to Mullins that he "can't drive a rock truck" was, at best, ambiguous. Conatser himself testified that he knew how to operate trucks and had driven rock trucks on some seven previous occasions. Tr. 68-69, 125-26. Based in large part on this testimony, the judge found that Conatser's "can't" statement to Mullins simply was not true. 10 FMSHRC at 467-68. We concur, and find that this fact vitiates the asserted adequacy and clarity of Conatser's communication.

Conatser has maintained in this proceeding that his statement to Mullins really meant that he lacked the ability to operate a rock truck under the weather and road conditions present that day. However, Conatser conceded that he said nothing to Mullins at the time of his work refusal about his specific fears concerning the weather conditions, his inexperience driving a rock truck down a sloped haulroad, or his lack of training in operating a rock truck; rather, Conatser merely "figured" that Mullins would know these fears. Tr. 75-76, 117-19, 126, 142, 412, 524-25. To the contrary, Mullins testified that because Conatser had the general reputation of being capable of operating a rock truck among Red Flame miners who had seen him operate such vehicles when they were employed at the No. 8 Limited site, he believed Conatser could operate a rock truck on the morning of the work refusal. Tr. 173, 175-76, 246-47, 271, 273, 279, 377-79, 403, 406-09, 410-12. In any event, Mullins' unrebutted testimony reflects that in responding to Conatser's work refusal, he replied that "Larry and all them [other miners] ... drove them and there is no reason you can't." Tr. 415 (emphasis supplied). In our view, Mullins' response should have demonstrated to Conatser that Mullins did not comprehend the nature of Conatser's safety concerns. Yet, as the judge found, Conatser "did not elaborate further or explain to Mr. Mullins the reasons for his purported inability to drive the rock truck," and simply repeated his "can't" statement. 10 FMSHRC at 467.

In analyzing whether Conatser was prevented from communicating his safety concerns to Mullins, the judge found that Conatser had an ample opportunity to communicate with Mullins at the time of his work refusal. 10 FMSHRC at 468-69. It is undisputed that Conatser engaged Mullins in further conversation relating to his safety shoes before leaving the mine site. The judge also determined that Conatser's assertion that he could not communicate further with Mullins because he was "in shock" was difficult to believe. Id. The judge observed that Conatser did not strike him as a timid individual, but rather impressed him as a rather combative person. Id. These observations are in the nature of credibility resolutions and we reject Conatser's challenges to them. See, e.g., Robinette, supra, 3 FMSHRC at 813.

While we have made clear that in work refusal contexts a "[s]imple, brief" communication by the miner of a safety or health concern will suffice (Dunmire & Estle, supra, 4 FMSHRC at 134), we conclude that in the context presented by this case Conatser's communication fell short of the required sufficiency and clarity. Indeed, we believe that this case well illustrates many of the reasons for the communication requirement. From all that appears on this record, had Conatser articulated his safety concerns, they would have been addressed by the operator.

In this regard, we find the following observation of the judge, well-founded in the testimony, to be particularly salient:

> Foreman Mullins testified that had Mr. Conatser told him that he feared for his life or safety, or given him a reason for not driving the rock truck, he would not have required him to do so.

> Superintendent Davis testified that Mr. Mullins would not endanger anyone's life, and if he did, he would fire him. The miners who testified in this case corroborated the fact that Mr. Davis and Mr. Mullins were concerned for their safety and always addressed their concerns over the road conditions. Mr. Davis further confirmed that had Mr. Conatser informed Mr. Mullins that he was afraid to drive the truck, Mr. Mullins would have assigned someone to go with him, or assigned another driver. Former foreman Meade also confirmed that if anyone expressed fear or reluctance in operating a piece of equipment, he would either assign them to other work, or not require them to operate the equipment. In view of this testimony, which I find credible, it would appear to me that management at Red Flame and No. 8 Ltd. took appropriate action to address communicated safety concerns. However, in Mr. Conatser's case, since he did not communicate his safety concerns to his foreman at the time of his work refusal, the foreman had no opportunity to address them and take corrective action.

10 FMSHRC at 468 (emphasis in original).

We have considered Conatser's evidentiary challenges to the credibility of Mullins and to the judge's various resolutions of conflicting testimony and his credibility determinations and find no error of fact or law in the decision below. Conatser has not provided compelling reasons that would justify our taking the extraordinary step of overturning the judge's credibility findings and resolutions of disputed testimony and we decline to do so.

Accordingly, we conclude that the judge's finding that Conatser failed to adequately communicate a safety concern is supported by substantial evidence and is correct as a matter of law as applied to that evidence. Thus, we affirm the judge's conclusion that Conatser's work refusal was not protected by the Mine Act and that his discharge for that refusal did not violate the Act. 4/

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4/ Upon consideration of Conatser's Motion For Leave to File Reply Brief, and the opposition thereto, the motion is hereby granted. We have considered the brief in our decision.

For the foregoing reasons, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Ronald G. Polly, Esq.
Polly, Craft, Asher & Smallwood
P.O. Box 786
104 North Webb Avenue
Whitesburg, Kentucky 41858

Tony Oppegard, Esq.
Appalachian Research & Defense
Fund of Kentucky, Inc.
P.O. Box 360
Hazard, Kentucky 41701

Administrative Law Judge George Koutras
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 13, 1989

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket Nos. SE 87-8 |
| | : | SE 86-105-R |
| JIM WALTER RESOURCES, INC. | : | |

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

## DECISION

BY THE COMMISSION:

The issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"), is whether Jim Walter Resources ("JWR") violated mandatory safety standard 30 C.F.R. § 75.500(d). 1/ Commission Administrative Law Judge Avram Weisberger

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1/ 30 C.F.R. § 75.500 essentially restates section 305(a)(1) of the Mine Act, 30 U.S.C. § 865(a)(1), and provides:

> On and after March 30, 1971:
> (a) All junction or distribution boxes used for making multiple power connections inby the last open crosscut shall be permissible;
> (b) All handheld electric drills, blower and exhaust fans, electric pumps, and such other low horsepower electric face equipment as the Secretary may designate on or before May 30, 1970, which are taken into or used inby the last open crosscut of any coal mine shall be permissible;
> (c) All electric face equipment which is taken into or used inby the last open crosscut of any coal mine classified under any provision of law as gassy prior to March 30, 1970, shall be permissible; and
> (d) All other electric face equipment which is taken into or used inby the last crosscut of any

concluded that JWR violated the standard and assessed a $500 civil penalty. 9 FMSHRC 983 (May 1987)(ALJ). We granted JWR's petition for discretionary review challenging the judge's finding of violation. For the reasons that follow, we affirm.

JWR's No. 5 mine is an underground coal mine located in Tuscaloosa County, Alabama. A unique longwall method of mining is used in the mine resulting in large, uneven pillars (blocks) of coal and in interrupted crosscuts between the various entries. On July 1, 1986, Carl Early, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection of the mine pursuant to section 103(i) of the Mine Act. 2/ In the mine's No. 8 section, Early observed a distribution box, used to supply power to shuttle cars, located in a crosscut between the No. 2 and No. 3 entries. 3/ The distribution box was not permissible. Concluding that the location of the non-permissible electrical face equipment was in violation of 30 C.F.R. § 75.500(a), see n.1 supra, and that the violation significantly and substantially contributed to a mine safety hazard and was caused by JWR's unwarrantable failure to comply with the standard, Early issued an order pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 814(d)(2). 4/

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> coal mine, except a coal mine referred to in § 75.501, which has not been classified under any provision of law as a gassy mine prior to March 30, 1970, shall be permissible.

30 C.F.R. § 75.501 is not applicable to this proceeding.

2/ Section 103(i) requires that a spot inspection be conducted every five working days of all or part of each mine that liberates more than 1 million cubic feet of methane every 24 hours. 30 U.S.C. § 813(i).

3/ The inspector also determined that a non-permissible scoop charger located in the same line of crosscuts between the No. 3 and No 4 entries also violated the standard. The Administrative Law Judge, however, found no violation as to the scoop charger and his action is this respect is not before us on review.

4/ Section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), states in part:

> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations....

Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), requires

After JWR contested the validity of the order of withdrawal, MSHA modified the order to allege a violation of section 75.500(d). 5/ Subsequently, the Secretary proposed a civil penalty of $1,000 for the violation and a hearing was held.

At the hearing, the parties stipulated that the distribution box was in non-permissible condition and that, if a violation of section 75.500(d) was found by the judge, the violation was of a significant and substantial nature. The parties disagreed as to whether the non-permissible equipment was located in a last open crosscut and therefore violated section 75.500(d), and whether, if there was a violation, it was caused by JWR's unwarrantable failure to comply.

Government Exhibit 2, a schematic drawing of the No. 8 section, was received into evidence and was used by the witnesses as an aid in explaining the location of the subject equipment in relation to the mining configuration of the No. 8 section. As an aid to our discussion a black and white copy of Government Exhibit 2, reduced in size, is attached to this decision and incorporated herein.

Inspector Early explained that the black areas on Exhibit 2 depict the pillars of coal in the No. 8 section, the lettered areas depict crosscuts, and the numbered areas depict entries. The lightly shaded area designated "F" represents the crosscut in which the distribution box was located. Early described a crosscut as "a cut through connecting two entries," and described "F" as "the last crosscut connecting the number two and three entries." Tr. 21, 26. Early described "A" and "H" as the "last open crosscuts" between the Nos. 1 and 2 and the Nos. 3 and 4 entries, respectively. Early stated that during the normal mining cycle, the continuous mining machine, shuttle cars, roof-bolters and the scoop traveled through "F" to get from one side of the section to the other, and that the equipment was required to be in permissible condition. Early stated that methane buildup frequently occurred in "F" whenever the check curtain in the No. 3 entry was down or damaged.

MSHA ventilation specialist Jerry Vann described "F" as the last open crosscut between the Nos. 2 and 3 entries, and he described "A" and "H" as the last open crosscuts for purposes of the air readings required by the mandatory safety standards regulating mine ventilation. Tr. 74, 86, 108-09. 6/

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that an inspector issue a citation if he finds that a violation is "of such nature as could significantly and substantially contribute to a mine safety or health hazard" and is caused by the operator's "unwarrantable failure ... to comply" and that an order of withdrawal be issued if, during the same inspection or any subsequent inspection within 90 days after the issuance of such citation, he finds another "unwarrantable failure" violation.

5/ No explanation of this modification appears in the record and no issue concerning the propriety thereof is before us on review.

6/ The mandatory safety standards regarding air quantity, quality,

Charles Stewart, JWR's deputy mine manager, described "F" as the "last connecting crosscut" between the Nos. 2 and 3 entries and as the crosscut through which permissible equipment had to travel from one entry to the other. Stewart described "A" and "H" as areas subject to the ventilation requirements of 30 C.F.R. §§ 75.302 and 75.316, standards that reference the "last open crosscut." Tr. 158-59, 183-85. 7/

The Secretary argued to the judge that "F" was the last crosscut connecting the Nos. 2 and 3 entries. Therefore, the presence of the non-permissible distribution box in "F" established a violation of section 75.500(d). JWR argued that crosscut "F" cannot be a last open crosscut because other mandatory safety and health standards reference the term "last open crosscut" in a manner that would exclude crosscut "F." JWR maintained that, in light of these other standards (30 C.F.R. §§ 75.200-7(b)(3)(iii), 75.301-3(a) and 75.302(a)), a last open crosscut can be identified as the final tunnel (crosscut) that connects two entries and, in which crosscut, roof bolts must be tested. It is also the crosscut that separates the intake air from return air, through which a required volume of air must pass, and from which line brattice must be maintained to the working face. Lastly, it is the crosscut through which the air contaminated with methane and dust from the mining process passes. JWR Br. to ALJ at 7-8. JWR contended that when these requirements are applied to the crosscuts at the No. 5 Mine, crosscut "F" cannot be categorized as a last open crosscut.

In his decision, the judge rejected JWR's arguments stating that it would be "unduly restrictive to hold that the identification of the 'last open crosscut' for the purposes set forth in the [standards] cited by [JWR] mandates identification of the same crosscut for the purposes enumerated in section 75.500(d)." 9 FMSHRC at 985. Rather, the judge stated that he would be guided by Congress' intent in requiring that only permissible electrical equipment be taken into or used inby the last open crosscut -- "to assure that such equipment will not cause a

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and velocity in underground coal mines contain repeated references to the term "last open crosscut." See, e.g., 30 C.F.R. §§ 75.301, 75.301-3; See also n.5, infra.

7/ Section 75.302 requires that "[p]roperly installed and adequately maintained line brattice ... shall be continuously used from the last open crosscut of any entry or room of each working section to provide adequate ventilation to the working faces...."

Section 75.316-1(a)(10) requires the mine operator to submit to MSHA a mine map that includes the volume of air passing through the last open crosscut in each set of entries and rooms at each working face. 30 C.F.R. § 75.316-(b)(1) requires the mine operator to submit to MSHA a ventilation system and methane and dust control plan that shows methane and dust control practices in all "active working places," and 30 C.F.R. § 75.2(g)(2) defines "working place" as "the area of a coal mine inby the last open crosscut."

mine explosion or a mine fire." Id. 8/ The judge accepted the testimony of MSHA witnesses Early and Vann that methane was frequently detected in "F" and that any interruption of the check curtain in the No. 3 entry would permit a methane buildup. The judge concluded:

> [T]o hold that the crosscut in which the distribution box was located, is other than the last crosscut, would clearly lessen the assurance against a mine explosion or fire, and would accordingly be violative of the expressed purpose of section 318(i).... Furthermore ... [the Secretary's witnesses] all testified, in essence, that to their knowledge the only way that the crosscut in which the distribution box is located is referred to, is as the last crosscut.

9 FMSHRC at 986. The judge therefore concluded that JWR violated section 75.500(d) by having the non-permissible distribution box in "F," "which is the last crosscut between entries 2 and 3 and which is the last crosscut referred to in section 75.500(d)." Id. The judge assessed a $500 civil penalty for the violation.

On review, JWR repeats the arguments made below and argues that the judge improperly found that the distribution box was in a location that violated section 75.500(d). JWR contends that "A" and "H" are the last open crosscuts in entries No. 2 and 3, and that the judge's finding of "F" as the last crosscut for purposes of section 75.500(d) results in an inconsistent application of the other mandatory standards referencing last open crosscuts. We do not agree.

Section 75.500(d) prohibits the bringing of non-permissible electric equipment into or inby the last crosscut. 9/ The term "last

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8/ Section 318(i) of the Act, 30 U.S.C. § 878(i), defines permissible electric face equipment as:

> [A]ll electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which ... are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire....

9/ Sections 75.500(a), (b) and (c) use the term "last open crosscut." Section 75.500(d), however, references the "last crosscut." JWR states that "the terms 'last crosscut' and 'last open crosscut' are synonymous in the mining industry. There is no difference between the term 'last open crosscut' and 'last crosscut.'" JWR Brief at 6 n.1. For purposes of interpreting section 75.500, we agree. See, e.g., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Senate Subcommittee on Labor, 94th Cong., 1st Sess., at 53, 194, 749, 833, 1477, 1527 (1975). Therefore, we use the terms interchangeably

crosscut" or "last open crosscut" is not defined in either the Mine Act or its implementing regulations. However, a "crosscut" is recognized to be a passageway or opening driven between entries for ventilation and haulage purposes. U.S. Department of Interior, Dictionary of Mining, Mineral, and Related Terms 280 (1968) ("DMMRT"). A "last open crosscut" is that open passageway connecting entries closest to the working face. 10/ See Peabody Coal Co., KENT 86-94-R, slip op. at 5-6 (11 FMSHRC ____, January 12, 1989.) Given the mining configuration in use at JWR's mine, as represented in Government Exhibit 2, attached, we conclude that "F" is the last open crosscut between the Nos. 2 and 3 entries.

The inspector testified without dispute that during the normal mining cycle the Nos. 1, 2, 3 and 4 entries are driven forward. Coal is cut in one entry at a time. Tr. 41-45. Intake air travels across "F" and up the No. 3 entry to ventilate the working face in the No. 4 entry. Tr. 34-37. Further, during the cycle the continuous mining machine, shuttle cars, roof bolters and the scoop travel across "F" to get from one side of Section 8 to the other. Tr. 38-47. Thus, "F" is the last open passageway between the Nos. 2 and 3 entries that is used for ventilation and haulage purposes in this working section. See e.g., Tr. 26, 136-137, 185.

As the judge correctly stated, "There was no crosscut connecting entries 2 and 3 which was further inby the crosscut in which the distribution box was located." 9 FMSHRC at 985. Thus, we hold that substantial evidence supports the judge's conclusion that under the mining configuration followed at the time of citation, "F" was the last crosscut between Nos. 2 and 3 entries. 9 FMSHRC at 986.

We do not agree with JWR that, in light of other mandatory safety and health standards referencing the term "last open crosscut" and imposing various safety requirements in such crosscuts, it is fatally inconsistent or conflicting to hold that section 75.500(d) applies to crosscut "F" because compliance with those other requirements may not be logical or necessary in crosscut "F." We agree with the arguments of the Secretary that each standard using the term "last open crosscut" requires "that certain activities be conducted in an area in which it has been deemed most crucial" and that when interpreting these standards "due consideration must be given to their intended purpose as evidenced by their specific terms." Sec. Br. 8, 10. For example, air flow is required to be measured at the last open crosscut "that separates the intake and return air courses." 30 C.F.R. 75.301-3(a). Since crosscut "F" does not separate the intake and return air courses, the Secretary maintains that the air measurements required by that standard need not be taken at crosscut "F." Tr. 76; Sec. Br. 9. Similarly, line brattice is required from the last open crosscut of an entry "to provide adequate

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throughout this decision.

10/ A "working face" is "any place in a coal mine in which work of extracting coal from its natural deposit in the earth during the mining cycle is performed...." 30 U.S.C. § 878(g)(1); 30 C.F.R. § 75.2(g)(1). See also DMMRT 407, 1244 (definitions of "face" and "working face").

ventilation to the working faces." 30 C.F.R. 75.302(a). Because in JWR's configuration installing line brattice from crosscut "F" would impede the flow of air up the Nos. 2 and 3 entries, the Secretary represents that line brattice would not be required from crosscut "F" to the working faces. Sec. Br. 9-10. The Secretary also states that the torque-testing requirements of 30 C.F.R. 75.200-7(b)(3)(iii) apply only to roof bolts in parts of entries closer to the working face than crosscut "F" to ensure the proper installation of the most recently installed bolts. Sec. Br. 9. In sum, the Secretary represents that none of these standards exclusively defines "last open crosscut"; they simply require that certain activities be conducted addressing specific concerns usually presented by last open crosscuts, but not presented in crosscut "F" under this particular mining configuration. As we stated in Peabody, supra, "we recognize that in any given coal mine, the mining methodology may uniquely determine the last open crosscut. Thus, we must leave to future cases any descriptive refinements necessitated by other particular mining configurations." Slip op. at 6, fn. 8 (11 FMSHRC ___, January 12, 1989).

We agree with the Secretary's arguments. We note that in fact no citations were issued by the Secretary alleging violations of the other standards pointed to by JWR. We further note that we will remain cognizant of the representations and arguments made here by the Secretary in the unlikely event that the discussed regulations were to be interpreted in a manner inconsistent with the interpretation proffered in the present case. Therefore, we conclude that the requirements of these other standards do not prevent the classification of crosscut "F" as a last open crosscut for purposes of section 75.500.

For the foregoing reasons, we agree with the judge that "F" was the last crosscut for purposes of section 75.500(d), and we concur in his finding that JWR violated the regulation by locating the non-permissible distribution box in "F." Accordingly, we affirm the judge's decision.

Ford B. Ford, Chairman

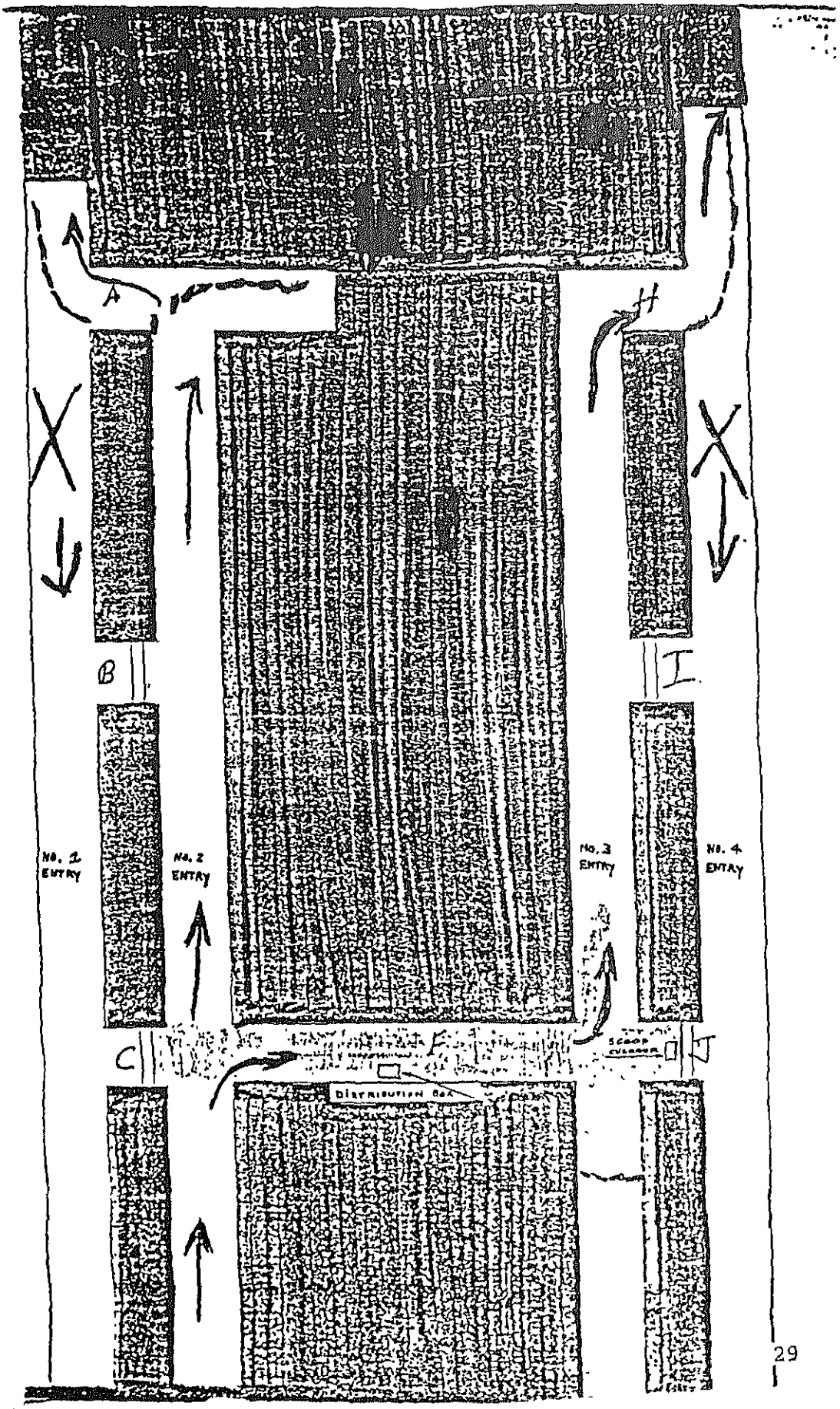
Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Government
Exhibit No. 2



Distribution

H. Thomas Wells, Jr., Esq.
David M. Smith, Esq.
Maynard, Cooper, Frierson & Gale, P.C.
Twelfth Floor, Watts Bldg.
Birmingham, Alabama 35203

H. Gerald Reynolds, Esq.
Jim Walter Corporation
P.O. Box 22601
Tampa, Florida 33622

R. Stanley Morrow, Esq.
Harold D. Rice, Esq.
Jim Walter Resources, Inc.
P.O. Box C-79
Birmingham, Alabama 35283

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 27, 1989

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 87-272 |
| BIRCHFIELD MINING COMPANY | : | |

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

## DECISION

BY: Ford, Chairman; and Backley, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act"). The primary issue is whether Birchfield Mining Company ("Birchfield") violated 30 C.F.R. § 75.303(a), a mandatory safety standard for underground coal mines requiring that all active workings of a coal mine be examined and the results of such examination be reported "before any miner in [any] shift enters the active workings of a coal mine." 1/

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1/ 30 C.F.R. § 75.303(a) restates section 303(d)(1) of the Mine Act, 30 U.S.C. § 863(d)(1), and provides in part:

> Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings.... Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane ... and shall make tests for oxygen deficiency ... examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are

Also at issue is whether the violation was significant and substantial in nature and caused by Birchfield's unwarrantable failure to comply with the standard, and whether the administrative law judge assessed an appropriate civil penalty for the violation.

Commission Administrative Law Judge Gary Melick found that Birchfield violated the standard, the violation was significant and substantial, and resulted from an unwarrantable failure by the operator. He assessed a civil penalty of $400 for the violation. 9 FMSHRC 2209 (December 1987)(ALJ). We granted Birchfield's petition for discretionary review. For the following reasons, we affirm the judge's decision respecting the fact of violation, and Birchfield's unwarrantable failure to comply. However, we reverse the judge's finding that the violation was significant and substantial in nature and we remand this matter to the judge for reconsideration of the civil penalty in light of that reversal.

The essential facts are not in dispute. On April 2, 1987, at approximately 7:30 a.m., John Baugh, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an inspection at Birchfield's No. 1 Mine, an underground coal mine located in Boone County, West Virginia. The inspector observed several miners on the 8:00 a.m. to 4:00 p.m. day shift change into working clothes and enter the mine. Baugh checked the mine examiner's book (the "fireboss

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> carried, approaches to abandoned areas, and accessible falls in such section for hazards; test ... to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require.... Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine.... Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination ... in a book ... kept for such purpose in an area on the surface of the mine ... and the record shall be open for inspection by interested persons.

book") and found that no preshift examination report had been recorded for the 8:00 a.m. to 4:00 p.m. day shift. Traveling into the mine, the inspector did not see anyone conducting a preshift examination nor did he observe any dates, times and initials in the areas required to be preshifted that would indicate that the preshift examiner for the day shift had inspected the mine.

At approximately 7:40 a.m., when he arrived at the No. 4 face, the inspector saw the miners that he had observed entering the mine, along with the midnight shift crew and their section foreman, Richard Henderson. Henderson was Birchfield's designated preshift examiner for the day shift. The inspector informed Henderson that a preshift examination would have to be completed for the 8:00 a.m. to 4:00 p.m. shift and that it was a violation of section 75.303(a) for miners to enter the mine prior to a preshift examination being completed.

The inspector issued a citation, pursuant to section 104(d)(1) of the Mine Act, alleging a significant and substantial and unwarrantable failure violation of section 75.303(a). 2/ The citation states in relevant part:

> An inadequate preshift examination was made in the 001-0 graveyard main section in that the results of the examination was not reported to a person designated by the operator to receive such reports at a designated station on the surface of the mine before other persons enter the underground area of such mine to work in such shift. The results were not recorded in the approved record book and ... no dates, time or initials have been placed in conspicuous locations.

At 8:45 a.m., the inspector terminated the citation after observing Henderson record the results of his preshift examination for the day shift in the fireboss book.

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2/ Section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), states in part:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]....

Subsequently, the Secretary proposed a civil penalty for the violation and Birchfield requested a hearing. Birchfield denied that it had violated the standard and challenged the inspector's significant and substantial and unwarrantable failure findings.

Before the judge, Birchfield argued that because the day shift miners had entered the mine during a shift for which a preshift examination had been performed and recorded (i.e., the midnight shift), it had not violated the standard. Rejecting this argument, the judge concluded that under the plain meaning of the standard, the preshift examination must be completed and reported out of the mine before any miner on the oncoming shift for which the preshift examination is required enters the mine. The judge found, based on the inspector's testimony, that the preshift examination for the day shift had not been completed and reported at the time the miners entered the mine. 9 FMSHRC at 2212-13. Therefore, the judge concluded that the violation of section 75.303(a) was proven as charged. 9 FMSHRC at 2212.

On review, Birchfield contends that the judge misconstrued the standard and that an operator complies with section 75.303(a) as long as a preshift examination had been completed and reported for the shift during which the miners enter the mine. Because the miners on the 8:00 a.m. shift entered the mine during the midnight shift, and because a preshift examination had been performed for that shift, Birchfield asserts that it complied with the letter and spirit of section 75.303(a). We disagree.

The inspector testified that the purpose of a preshift examination is to detect hazardous conditions in the mine and to correct or report such hazards before miners enter the active workings of the mine. He testified that if miners enter the mine before the preshift examination is completed and the results reported, there exists a hazard that undetected dangerous conditions could injure incoming miners. Tr. 39-41.

The inspector's concern over undetected and unreported hazards is consistent with that of Congress. The cited standard reiterates section 303(d)(1) of the Mine Act, 30 U.S.C. § 863(d)(1), which was carried over without change from the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 863(d)(1) (1976). The Senate Report states, "Changes occur so rapidly in the mines that it is imperative that the examinations be made as near as possible to the time the workmen enter the mine." Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 183 (1975) ("Coal Act Legis. Hist."). Accordingly, as both the Senate Report and the Conference Report explain:

> No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Coal Act Legis. Hist. at 183 and 1610.

Contrary to Birchfield's assertions, the language of section 75.303(a) clearly requires that the preshift examination be completed "before any miner ... enters the active workings," and that the results of the preshift examination be reported out of the mine "before other persons enter the underground areas of ... [the] mine to work." (Emphasis supplied.) The judge found and it is undisputed that three or four day shift miners were present in the active workings of the mine at approximately 7:40 a.m. on April 2, 1987, before the designated preshift examiner had reported the results of his preshift examination to an operator-designated person on the surface of the mine. Thus, we conclude that the judge's interpretation of section 75.303(a) is correct and his finding of a violation is supported by substantial evidence. We turn, therefore, to the question of whether the violation was of a significant and substantial nature and was due to Birchfield's unwarrantable failure to comply.

A violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573-74 (July 1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

At the outset, we reject the Secretary's argument on appeal (Br. 10) that any violation of section 75.303(a) is per se significant and substantial in nature. Rather, the proper test is that which we enunciated in Mathies. In applying the Mathies formula to the violation at issue, we have found that substantial evidence supports the judge's finding that Birchfield violated section 75.303(a). Therefore, the first element of the Mathies formula is established. Review of the judge's analysis beyond that point, however, reveals that he effectively ignored the second element of the Mathies formula, i.e., whether the violation presented a discrete safety hazard.

Because the administrative law judge has failed to make findings regarding the second element, and because the record contains insufficient evidence on that issue to satisfy the National Gypsum/Mathies test, we conclude that the violation was not "significant and substantial." Specifically, in evaluating the totality of conditions and circumstances in existence at the time of citation, we do not believe that the violation contributed a "measure of danger to safety."

The record before us demonstrates that the inspector's actual enforcement actions, or lack thereof, belie his judgment that conditions in Birchfield's No. 1 Mine posed such a measure of danger to safety that failure to report and record them prior to the arrival of the day shift miners constituted a significant and substantial violation of the preshift standard. Furthermore, numerous factors not considered by the judge serve to mitigate the "hazardous conditions" relied upon by the judge in upholding the inspector's significant and substantial finding.

First, the miners who prematurely entered the mine before the completion of the preshift examination were all certified firebosses and thus were all qualified to perform preshift examinations. We can infer from this that they would have been more acutely aware of potential hazards than the average miner. Second, the mine had been in operation only six calendar days prior to the day of inspection and had only progressed 150-160 feet from the surface opening, about half the length of a city block. Obviously, there were simply not as many potential sources of hazard as would be present in a large, established mine, such as the one the inspector had once preshifted and where his habit was to place his initials every 1000 feet as the examination progressed (Tr. 14).

Third, for purposes of determining a violation of the cited regulation we have rejected Birchfield's argument that the 8:00 a.m. shift miners entering the mine during the midnight shift were covered by the pre-shift exam for the midnight shift. We think it probative, however, for purposes of settling the significant and substantial issue, to note the lack of enforcement action taken by the inspector to counteract the allegedly hazardous conditions existing on the 001-0 main section. Indeed, it strikes us as peculiar that the miners on the midnight shift would have been exposed to what the inspector deemed hazardous conditions whether or not members of the day shift entered the mine prior to completion of the preshift inspection. Moreover, while entry by the day shift miners prior to the full execution of the preshift examination is clearly violative, it does not, in and of itself, rise to the level of seriousness that would exist if the mine had been idle prior to the start of the day shift.

In summary, there is a clear lack of symmetry between what the inspector alleged to be a measure of danger to safety and the enforcement measures he actually took or failed to take.

There are also strong factors that serve to mitigate the relative seriousness of the conditions that were extant when the citation was issued and that are relied upon by the judge in reaching his conclusion

that the violation was "significant and substantial."

First, although the No. 1 mine was located in a coal seam known to liberate methane, Birchfield's on-shift methane tests during the midnight shift and the inspector's own tests revealed methane levels in the No. 1 Mine substantially below those that would pose a hazard (Tr. 70, 89). 3/ Regarding the lack of test holes twenty feet in advance of the face, serious questions arise as to its relevance to the question whether the inadequate preshift inspection was a significant and substantial violation. 4/ Even so, the preshift report accepted by the inspector as abatement in this case did not mention the lack of test holes, nor did the preshift report for the preceding midnight shift. This is significant because the Secretary appears to accept the preshift examination report for the midnight shift as being in compliance with section 75.303(a).

Birchfield does not dispute that an auxiliary exhaust fan was inoperative, causing a second blowing fan to stir up dust around the continuous miner. This, however, appears to have been an obvious condition rather than a latent one and would have been readily apparent to any day shift miner coming on the scene. Furthermore, the inspector portrays this condition as an important basis for his significant and substantial finding, but he did not issue a citation charging for instance, a violation of 30 C.F.R. § 75.401 (referring to excessive levels of dust) (Tr. 68-69). The failure to cite the operator in these circumstances further erodes the "serious hazard" basis of the significant and substantial finding.

For all these reasons, we agree with Birchfield that substantial evidence does not support the judge's finding that the violation of section 75.303(a) was significant and substantial in nature.

We reject, however, Birchfield's challenge to the finding of unwarrantable failure. A violation of a mandatory safety standard is

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3/ The Birchfield No. 1 Mine was adjacent to a bleeder entry for an older underground mine, but the record shows that although that bleeder was not totally passable, it was being ventilated and tests for methane were being conducted at specified evaluation points. (Tr. 78-79).

4/ Whether test holes are required in the circumstances sketchily presented is a matter that need not be decided here. The working face was 140 feet from the older workings, and it is clear that Birchfield was mining away from the adjacent bleeder rather than approaching it. The record on the test hole citation is confused, but it appears that Birchfield chose not to contest the citation and paid a $20.00 single penalty assessed by the Secretary. (Tr. 82-83; Gov. Ex. A). Furthermore, the record indicates that mining was allowed to proceed without abatement of the test hole citation because Birchfield had filed a petition for modification of the standard. (Tr. 137-38) These enforcement decisions seriously undermine the inspector's assertion that a lack of test holes constituted a "serious hazard" for purposes of determining the seriousness of the preshift violation.

caused by an operator's unwarrantable failure if the operator has engaged in "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2002 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). The judge found that "[s]ince the requirement [of section 75.303(a)] is set forth in plain and unambiguous language ... the operator's agents should have known of the violation" and accordingly concluded that the violation of section 75.303(a) was the result of "inexcusable aggravated conduct constituting more than ordinary negligence." 9 FMSHRC at 2213.

It is undisputed that Birchfield officials knew that several miners had entered the active workings of the mine before the preshift examination had been completed and the results reported and that this was not an isolated violation of section 75.303(a). Both Henderson's and Bailey's testimony reveals that miners had routinely reported to the face areas of the mine before preshift examinations had been completed. Tr. 107-08, 120. Further, Henderson, admitted that he had not read section 75.303(a), the mandatory safety standard in issue, although he had been performing preshift examinations for approximately 13 years. Tr. 111.

Uncontroverted evidence thus establishes that on this and previous occasions Birchfield officials regularly permitted oncoming shift miners to enter the active workings of the mine before a preshift examination had been completed and reported as required by section 75.303(a). Such conduct, in conjunction with the admission of the designated preshift examiner that he had not read the standard that governs the timing, content, conduct and reporting of preshift examinations, demonstrates aggravated conduct exceeding ordinary negligence.

Birchfield's last contention is that the judge erred in assessing a $400 civil penalty for the violation of section 75.303(a). Birchfield argues that the judge failed to consider two of the six civil penalty criteria mandated by section 110(i), 30 U.S.C. § 820(i) -- the ability of Birchfield to continue in business and the gravity of the violation. Birchfield also contends that the civil penalty assessed is "excessive to the point of arbitrariness." B. Br. 17.

"When a judge's penalty assessment is put in issue on review, we must determine whether it is supported by substantial evidence and whether it is consistent with the statutory penalty criteria." Pyro Mining Co., 6 FMSHRC 2089, 2091 (September 1984). While in his decision the judge did not specifically address the question of the impact of a penalty upon the operator's ability to continue in business, the parties stipulated at the hearing that "[p]ayment of the assessed civil penalty will not affect [Birchfield's] ability to continue in business." Tr. 7. Therefore, the stipulation establishes this statutory penalty criterion.

As to the gravity of the violation, however, the judge relied on his determination that the violation was "significant and substantial and a serious hazard." 9 FMSHRC at 2214. Since we have reversed the significant and substantial finding, it is appropriate for the judge to determine whether that reversal would have any effect on his assessment of the civil penalty.

For the foregoing reasons, the decision of the judge is affirmed as to the fact of violation, and the finding of unwarrantable failure to comply. The decision is reversed, however, on the issue of whether the violation was significant and substantial and remanded as to whether the reversal of the significant and substantial finding would affect the amount of the civil penalty. The section 104(d)(1) citation is also modified to a section 104(a) citation.

Ford B. Ford, Chairman

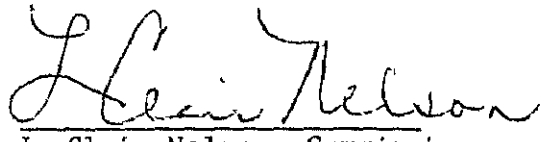
Richard V. Backley, Commissioner

Commissioner Nelson, concurring:

A basic problem in this case causes me to concur with Chairman Ford and Commissioner Backley in reversing the judge's finding that the violation was of a significant and substantial nature. When the inspector observed miners on the 8 a.m. shift at the No. 4 face, he also observed miners from the midnight shift at the same place at the same time. The inspector issued a citation under section 75.303(a) because he found several miners from the 8 a.m. shift in the mine when no record had been made of a preshift examination for the 8 a.m. shift. Indisputably, a preshift examination had been made for the midnight shift. Our colleagues cite a number of threatening circumstances vis-a-vis the 8 a.m. shift miners, but the midnight shift miners were in the same place at the same time and by a quirk in the regulatory requirements the latter workers apparently stand outside the circle of danger as viewed in this circumstance. It is noteworthy that if the 8 a.m. shift miners had not entered the mine prematurely there would be no basis for this citation even if it were conceded that the threatening circumstances obtain.

Consequently, it seems inappropriate to attach to this citation a finding that (in statutory words) "such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." That finding might be appropriate if the inspector had cited the kind of threats to safety enumerated by our colleagues but, to repeat, it seems inappropriate here where the inadvertent effect is to divide into two classes miners whose vulnerability to safety hazards is actually equal.

With respect to the significant and substantial finding, I would not argue with Commissioners Doyle and Lastowka concerning an "inspector's independent judgment" and the appropriate weight to be accorded thereto by the judge in proper circumstances. However, for the reasons stated, I cannot conclude from the record that substantial evidence supports the judge's finding that the violation herein was of a significant and substantial nature.



L. Clair Nelson, Commissioner

Commissioners Doyle and Lastowka, concurring in part and dissenting in part:

We agree with the majority that the administrative law judge interpreted 30 C.F.R. § 75.303(a) correctly and that his finding of a violation is supported by substantial evidence. We also agree with the majority that substantial evidence supports the judge's finding that the violation was the result of Birchfield's unwarrantable failure to comply with the mandatory safety standard. We dissent, however, from that part of the majority decision reversing the judge's finding that the violation of section 75.303(a) was of a significant and substantial nature.

In Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981) the Commission emphasized that an "inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented." 3 FMSHRC at 825-26. Where, as in the present case, an inspector's judgment that a violation of section 75.303(a) is significant and substantial in nature is based upon the existence of hazardous conditions that a preshift examination should have detected and reported and which, if undetected, pose a safety hazard to miners, that judgement should be accorded appropriate weight. See generally, Mathies Coal Co., 6 FMSHRC 1, 5 (January 1984); Consolidation Coal Co., 6 FMSHRC 189, 194-95 (Feburary 1984). Citing Mathies, the judge accorded due weight to the inspector's judgment and found that "[w]ithin the framework of the evidence," the violation of section 75.303(a) was significant and substantial in nature. 9 FMSHRC at 2213. Because the judge's finding of a significant and substantial violation has substantial support in the record and we are bound by a substantial evidence standard of review (30 U.S.C. § 823(d)(2)(A)(ii)(I)), the majority errs in substituting its judgment for that of the trier of fact. Donovan on behalf of Chacon v. Phelps Dodge Corp., 709 F.2d 86, 94 (D.C. Cir. 1983).

We agree with the majority that the proper test to apply is that set forth in Mathies and that the first element of the Mathies test is established in this case by the fact of violation found by the judge and affirmed by the Commission. The second element in the Mathies test requires that the violation contribute to a measure of danger to safety. In this regard, the inspector testified that in evaluating the violation of section 75.303(a) to be of a significant and substantial nature, he considered several factors. The coal seam being mined is known to liberate large quantities of methane. Further, it is adjacent to a bleeder entry of older underground workings that cannot be fully inspected and that are known to liberate methane. Tr. 42, 55, 68-69. Also, Birchfield was not drilling required test holes in advance of the face, even though the mine was within 140 feet of adjacent older workings. Tr. 79-80. Because of this failure to drill test holes the inspector issued a citation alleging a violation of 30 C.F.R. § 75.1701. */ Birchfield did not contest this citation and paid the penalty proposed for the violation. In addition,

*/ This standard provides:

> Whenever any working place approaches ... within 200 feet of any workings of an adjacent mine ... boreholes shall be drilled ... at least 20 feet in advance of the working face and shall be continually maintained to a distance of at least 10 feet in advance of the advancing working face....

at the No. 4 face, an auxiliary fan was not functioning, causing dust to be blown over the working miners and posing both a health and an ignition hazard. Tr. 68. All of these hazards, the inspector believed, were subject to observation and reporting during the performance of a preshift examination.

The majority asserts that the inspector failed to take "enforcement actions" against Birchfield for the conditions he relied upon in making his finding that the violation was of a significant and substantial nature and that this failure demonstrates that the conditions did not pose a measure of danger to safety. Slip Op. at 6. This conclusion cannot be drawn from the record in this case. First, the inspector did issue a citation for Birchfield's failure to drill required test holes, a condition that was key to his significant and substantial finding. Second, the inspector personally observed each of these conditions. Thus, the inspector did not base his significant and substantial finding on hypothetical hazards but rather on actual hazardous conditions he found at the time of his inspection. In any event, the Mine Act does not require that, in order for one violation to be considered significant and substantial, other violations must also be in existence or that, in order to support a significant and substantial finding made in one citation, an inspector must issue additional citations.

The majority further concludes that the safety hazards observed by the inspector were "mitigated" by the fact that the individuals who entered the mine before completion of the preshift examination were certified firebosses, the mine was recently developed, and other miners from the previous shift were already present in the mine. Slip op. at 6. In reaching this conclusion the majority simply reweighs the evidence to reach their own conclusion regarding the presence of hazards rather than determining whether substantial evidence supports the judge's crediting of the inspector's significant and substantial finding. In our opinion, there can be little doubt on this record that the failure to complete the required preshift examination prior to the shift entering the mine contributed to the existence of a discrete safety hazard. Therefore, we find the second element of a significant and substantial violation to also be satisfied.

As to the third element of the Mathies test, the inspector believed that because Birchfield was mining in a seam with a history of high methane liberation, less than two hundred feet from an adjacent mine with known concentrations of methane, without drilling required test holes, coupled with the inadequate ventilation at the No. 4 face and the resulting dust problem, it was reasonably likely that continued violation of section 75.303(a) would result in an injury-causing event. Tr. 66-69. This testimony provides substantial support for a finding that, given continued mining operations (U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984)), it was reasonably likely that an accident resulting in an injury or an illness would occur. The Commission has emphasized that "[i]n order to establish a significant and substantial nature of a violation the Secretary need not prove that the hazard contributed to actually will result in an injury-causing event.... [P]roof that the injury-causing event is reasonably likely to occur is what is required." Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 678 (April 1987) (citations omitted).

The fourth element of the Mathies test requires that there be a reasonable likelihood that any resulting injury would be of a reasonably serious nature. The majority concludes that certain factors "serve to mitigate the relative seriousness of the conditions" found by the inspector. Slip Op. at 6-7. In their view, these factors include the fact that at the time of the citation the methane level was found by the inspector to be acceptable, an inoperative exhaust fan causing coal dust to be stirred up was an "obvious condition rather than a latent one," and citations were not issued for each of these hazards noted by the inspector. Slip Op. at 7. In our opinion, each of these "mitigating" factors lacks merit. Birchfield's failure to take a methane reading during a required preshift examination in a coal seam known to liberate high amounts of methane presents a serious safety hazard in and of itself, regardless of how the results are viewed post hoc. Thus, contrary to the opinion of the majority, the fact that the inspector's methane test did not indicate a high level of methane at the time of his test is not determinative of the seriousness of the danger posed by the operator's failure to perform the test in the first instance. Nor do we see how the fact that the dust hazard caused by faulty ventilation was obvious to the inspector should serve to mitigate the hazard presented. As to the lack of other citations, we have already observed that another citation was issued by the inspector and that, in any event, additional citations are not required to support a significant and substantial finding.

Several other mitigating factors relied upon by the majority to reverse the judge's significant and substantial finding also miss the mark. For example, we derive no solace from the fact that the violation occurred in a recently opened mine. The length of time that a mine has been opened has no bearing on the seriousness of a failure to conduct a preshift examination in such mine. Also, we fail to see how the fact that other miners on the outgoing shift may have been exposed to the same hazards as the miners on the incoming shift "mitigates" the seriousness of the hazards posed to the incoming miners by the failure to complete the required preshift examination. Based on the above, the fourth element of the Mathies test also has substantial record support.

In sum, we find that the majority's after the fact "mitigation" analysis effectively eviscerates the important prophylactic purpose behind requiring preshift examinations in the first place. We therefore conclude that substantial evidence supports the judge's finding that the violation of section 75.303(a) was significant and substantial in nature.

For these reasons, we dissent from that part of the majority's decision reversing the judge's finding that the violation was of a significant and substantial nature.

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

Distribution

Anthony J. Cicconi, Esq.
Shaffer & Shaffer
330 State Street
P.O. Box 38
Madison, West Virginia 25130

William Sotver, Esq.
MAE Services
40 Eagles Road
Beckley, West Virginia 25801

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

# ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 3 1989

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. CENT 88-76-M |
| | : | A.C. No. 34-00026-05515 |
| v. | : | |
| | : | Tulsa Plant |
| BLUE CIRCLE INCORPORATED, Respondent | : | |

DECISION

Appearances: Mary Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Robert McCormac, Industrial Relations Manager, Blue Circle Incorporated, Tulsa, Oklahoma, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner seeks a civil penalty assessment of $147, for an alleged violation of mandatory safety standard 30 C.F.R. § 56.20011, as stated in a section 104(a) "S&S" Citation No. 3061188, served on the respondent by MSHA Mine Inspector Jimmie L. Jones on November 20, 1987.

The respondent filed a timely notice of contest and answer denying the violation and a hearing was held in Tulsa, Oklahoma. The parties waived the filing of written posthearing arguments, but I have considered their oral arguments made in the course of the hearing in my adjudication of this matter.

## Issues

The issues presented are (1) whether the respondent violated the cited standard, and if so, the appropriate civil penalty which should be assessed taking into account the civil penalty assessment criteria found in section 110(i) of the Act; and (2) whether the alleged violation was "significant and substantial" (S&S). Additional issues raised by the parties are identified and disposed of in the course of this decision.

## Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1, et seq.

3. Mandatory safety standard 30 C.F.R. § 56.20011.

## Stipulations

The parties stipulated to the following relevant matters (Tr. 4-6):

> 1. The respondent is subject to the jurisdiction of the Act, and the alleged violation took place in or involves a mine that has products which enter or affect commerce.
>
> 2. The subject mine is located near Tulsa, Rogers County, Oklahoma, and had an annual production rate of 242,098 tons or hours worked. The size of the respondent's operation is 1,568,568 production tons or hours worked per annum.
>
> 3. The imposition of a civil penalty assessment for the alleged violation will not adversely affect the respondent's ability to continue in business.
>
> 4. The total number of inspection days for the 24-month period preceding the issuance of the subject citation is 42, and the total number of assessed violations for this time period, including single penalty assessments, is 13.

5. The citation in question in this case was immediately abated by the respondent.

## Discussion

Section 104(a) "S&S" Citation No. 3061188, November 20, 1987, cites an alleged violation of mandatory safety standard 30 C.F.R. § 56.20011, and the condition or practice is described as follows:

> There was no barricades or warning signs along the perimeter and approaches into the mill building where employees travel. A roofer contractor was working 75 feet above where rolls of roofing material, 5 gal. pails, large propane gas cylinders and other materials were being used and handled. The roof sloped about 3/12 and would easily allow dropped items to fall to ground level.

### Petitioner's Testimony and Evidence

MSHA Inspector Jimmy L. Jones testified as to his background and experience, and he confirmed that he issued the contested citation on November 20, 1987, at the respondent's cement plant and limestone quarry site. He explained that he was at the site conducting a special investigation of a discrimination complaint, and that prior safety complaints had been made by mine personnel against the roofing contractor who was performing work at the mine. During the course of his interview with an employee foreman of the respondent on November 20, the employee advised him that he had observed the contactor's truck on the premises that day and that the contractor was there to do some work. Mr. Jones and respondent's industrial relations manager Robert McCormac then went to the mill building and went up on the roof.

Mr. Jones stated that no one was working on the roof on November 20, but that he observed some roofing material and equipment left there by the roofing contractor who was re-roofing the mill building roof. Mr. Jones stated that the roof was approximately 50 to 75 feet high and several hundred feet long. He identified exhibits P-1 and P-2 as sketches that he made of the roof area, and he described the materials which he found on the roof as rolled roofing material, 5 gallon pails of mastic material, a homemade hand-truck, a 20 pound propane bottle cylinder, and a 60 pound propane bottle cylinder. Mr. Jones confirmed that respondent's photographic exhibits J-1 and J-2, are photographs of the mill

building in question, and the roof after the re-roofing work was completed.

Mr. Jones stated that a portion of the roof work had been completed on November 20, but that the roof area where he observed the materials and equipment in question had not been finished. He stated that the 60 pound propane bottle and hand-truck were not secured or tied down, and he was concerned that the propane bottle could fall over and roll off the roof and strike a passing vehicle or service or maintenance personnel walking along the conveyor walkway below the roof. The roof peaked at the center, and had a 3/12 pitch. He believed that winds could have toppled the propane bottle and caused it to fall over and roll off the roof to the ground below. If the bottle struck a vehicle, it would cause serious damage, and if it struck anyone it would result in injury. There was also a chance of the propane bottle valve striking the ground, and if this occurred, the bottle could become airborne and cause injuries or damages if it struck personnel or vehicles (Tr. 8-24).

Mr. Jones believed that the hazard presented by the unsecured propane bottle on the roof would not be obvious to anyone travelling on foot in the area below the roof or a vehicle using the roadway. He observed no barricades or warning signs blocking off the walkway or roadway below the roof area in question. However, in another roof area where the contractor had worked on a flat-roof section removing old roofing material and concrete, and had dumped these materials off the side of the roof, the area below had been barricaded and tied off by 55-gallon drums and yellow marking tape.

Mr. Jones stated that he discussed the conditions which prompted him to issue the citation with Mr. McCormac, and that he voiced no objections with his findings.

Mr. Jones confirmed that he based his "S&S" finding on his belief that it was reasonably likely that the hazard presented would have resulted in injury because of the height of the roof, the amount of work which had been performed on the roof, and the fact that vehicles and personnel would be travelling in the area below the roof location where the materials were located. Mr. Jones also confirmed that he made a negligence finding of "moderate," and that he did so because the contractor, rather than the respondent, created the hazard, and that the respondent may not have been in the area and did not recognize the hazard. He also stated that he found no evidence that the respondent was making regular

reviews of the contractor's work while it was in progress (Tr. 24-27).

Mr. Jones confirmed that during his inspection of the roof on November 20, he found that the ladder used by him and Mr. McCormac to gain access to the roof had not been secured, and that he issued citations to the contractor for not securing the ladder and for not providing a safe means of access to the roof. He also confirmed that he had cited the contractor for other violative conditions in connection with the lack of safety lines for its personnel while working on the roof, failure to secure equipment while working on the roof, and the failure by contractor employees to wear hard hats, safety shoes and safety glasses. Mr. Jones conceded that "in hindsight," he probably should have also cited the contractor for the violation in question in this case (Tr. 27-32).

On cross-examination, Mr. Jones conceded that the prior complaints concerning the contractor's work on the roof were not reduced to writing or served on the respondent as required by section 103(g)(1) of the Act. Mr. Jones explained that he was not at the mine for the purpose of conducting a section 103 investigation or inspection, but that he was there conducting a special investigation in connection with a discrimination complaint against the respondent. He confirmed that the discrimination complaint is still in litigation, and that it was filed by an employee who alleged that some action had been taken against him for complaining about alleged contractor violations at the site.

Mr. Jones reiterated that no one was working on the roof when he inspected it on November 20. He conceded that while it was true that someone or something would have to put the materials in motion before they could fall off the roof, he believed that a wind could have toppled over the free standing 60 pound propane bottle and caused it to roll off the roof.

Mr. Jones confirmed that he was primarily concerned with the 60 pound propane bottle and the hand truck, and not the other materials on the roof. He explained that it was not likely that the rolls of roofing materials, pails, or smaller propane bottle would fall off the roof because they were stored in such a manner as to preclude this from happening (Tr. 33-53).

Mr. Jones stated that regardless of the type of inspection or investigation being conducted by an inspector at any given time, an inspector is authorized to issue citations for

violations and to use an appropriate MSHA "incidental inspection" code to identify the inspection. He reiterated that in the case at hand, the information which prompted him to visit the roof with Mr. McCormac came to his attention through his discussions with the foreman in connection with his investigation of a prior discrimination complaint (Tr. 54).

Mr. Jones confirmed that everyone he spoke with in connection with his discrimination investigation was aware of the fact that the contractor was on the roof from time-to-time performing work. He confirmed that after his inspection which resulted in the issuance of the citation in issue in this case, he returned to the mine to complete his discrimination investigation and to abate some prior citations, and he observed the contractor performing work on the roof (Tr. 55).

In response to further questions, Mr. Jones stated that the propane bottle in question "was nearly in a straight-line relationship to that conveyor" and that "My judgment was it was only reasonably likely that it could fall and it could strike either that roadway or that conveyor" (Tr. 94). In response to a question as to whether or not barricades need to be in place regardless of whether anyone is actually doing any work on the roof, Mr. Jones responded as follows (Tr. 94-95):

> MR. JONES: No. The only reason that they needed the barricaded warning sign was because of this unsecured bottle and stuff up there when no one's working up there. If they would secure that material, then they could take their barricades down.
>
> But all the time that people are working up there on that sloped roof along the perimeter, they're down on the ground. They have no idea what position these people are in. They need to have that roadway and that conveyor blockaded because you never know where the material would come from because they're working along the length of that building.

William J. Brock, testified that he is employed by the respondent as a repairman and welder, and also serves as the vice-president of the local union and representative of the miners working at the mine. Upon review of inspector Jones' sketch, exhibit P-1, he confirmed that prior to the inspection of November 20, he observed the roofing contractor working on the roof in question, and also observed the equipment and materials described by Mr. Jones. Mr. Brock also observed the

contractor performing work on the roof after the citation was issued.

Mr. Brock stated that he observed no barricades or warning signs in place on the roadway or the conveyor walkway in the area beneath the roof location where the cited materials and equipment were observed by Mr. Jones on November 20. Mr. Brock confirmed that employees and trucks would have occasion to be on the roadway and walkway in the unprotected area under the roof. He stated that a dust truck travelled the roadway every 30 minutes, and that contractor vehicles also used the roadway. In addition, respondent's loaders would also be in the roadway area working and moving material, and that mine employees would be on foot in the area of the tripper belt in the morning at the beginning of the shift, and at the end of the shift. An oiler and rock crusher operator would also be on the conveyor walkway at least once a day.

Mr. Brock stated that prior to the inspection by Mr. Jones on November 20, he had questioned the respondent about the lack of barricades at another location at the west end of the mill building where the contractor was hauling materials and equipment up to the roof. After receiving no response, Mr. Brock stated that he took it upon himself to rope the area off (Tr. 61-67).

Mr. Brock stated that the walkway located on the elevated conveyor belt is partially covered with a roof, and that individuals using that walkway would not normally be walking on the roadway below the conveyor. However, people would be on the roadway on foot occasionally (Tr. 68). With regard to the lack of any barriers on the east side of the building, Mr. Brock confirmed that he had no particular knowledge that work was being performed on the roof at that location, and that it was possible that any work on the roof was taking place on the west side of the roof apex. He confirmed that he was not on the roof at that time (Tr. 69). He also confirmed that while he was at work on the day of Mr. Jones' inspection when the citation was issued, he did not visit the cited roof area with Mr. McCormac or Mr. Jones to view the conditions (Tr. 75).

Respondent's Testimony and Evidence

Bobby McFarland, respondent's utility supervisor, testified that his duties included the supervision of the plant labor department which is responsible for cleaning the plant and insuring that work areas are barricaded as required. In those instances where it is necessary to perform cleaning on

elevated areas, and materials are thrown off the roof, the bottom wall and ground areas are barricaded. He confirmed that he was aware of the fact that Patterson Roofing Company was doing some roof work at the plant "last fall" (Tr. 76-77). His crew was assigned to keep the ground barricaded and roped off while Patterson Roofing was doing any work that presented a hazard, and that this was done "when they was there working." With regard to the day the citation was issued, Mr. McFarland confirmed that the roofing contractor was not at the plant site and that the area around the building in question was not roped off that day because no one told him that the contractor would be there (Tr. 78).

On cross-examination, Mr. McFarland confirmed that he was at work on the day the citation was issued, and although he went to the ground area of the crane storage building, he did not accompany Mr. Jones and Mr. McCormac on the roof during their inspection. Prior to this time, he was aware of the fact that the contractor had worked on the east side of the building (Tr. 79). He confirmed that when the contractor was working on the north side of the building, he barricaded the area, but not the entire perimeter of the east side (Tr. 79). The area which was barricaded was at the location where materials where being removed and thrown off the roof. He identified the area which had previously been roped off and barricaded by reference to a sketch and photograph (exhibit P-1 and J-1; Tr. 80-82). The barricades were up "probably the day before" the citation when work was taking place, but they did not remain up for the entire time the workers were on the roof working because they were taken down so that truck traffic could pass through the area. Mr. McFarland believed that the barricades were "probably taken down to the edge of the road" (Tr. 83).

Mr. McFarland explained that the barricades consisting of ropes placed around empty barrels, were put up when the roofing contractor was hoisting building materials to the top of the roof by means of a crane and a pulley rope. When asked whether or not the barricades remained in place after the materials were on the roof, Mr. McFarland responded as follows (Tr. 85-88):

> JUDGE KOUTRAS: After the materials are up on the roof and the guys start to work, what happens to the barricades?
>
> THE WITNESS: Okay, the one on the east side there gets pulled back to the road where the traffic can go through, and on the north and

south side up in front, why, they get taken down for that night. If they start to work the next morning, we put them up; if they don't work, we don't put them up.

JUDGE KOUTRAS: But if they are up there working, are the barricades still up?

THE WITNESS: They're supposed to stay up, yes sir.

* * * * * * *

JUDGE KOUTRAS: Why is that?

THE WITNESS: If you -- to keep stuff from falling, people walking under them.

JUDGE KOUTRAS: Then if for some reason the contractor decides not to work on any particular day and there is nobody up there, then the barricades are taken away; is that what you are saying?

THE WITNESS: Yes. They'll be pushed up against the building.

JUDGE KOUTRAS: Then when the contractor comes out again, they're pulled out and put up again; is that what you are telling me?

THE WITNESS: Yes, that's what . . .

JUDGE KOUTRAS: Now, on November 20th when the inspector issued this citation, were you at work?

THE WITNESS: Yes.

JUDGE KOUTRAS: Were the barricades up or against the building that day?

THE WITNESS: They was probably against the building that day because he didn't work.

JUDGE KOUTRAS: You say "probably." Do you know for a fact that they were against the building? Did you go up there?

THE WITNESS: No, I didn't go on top.

JUDGE KOUTRAS: Not on the roof, did you go to that area? Did you have any reason to be there?

THE WITNESS: Yes, I have a reason to go every day there around the building.

JUDGE KOUTRAS: Do you remember seeing any barricades there?

THE WITNESS: No.

JUDGE KOUTRAS: They were up in the roadway?

THE WITNESS: They was in the area, but they probably wasn't on that day because they wasn't working. I have a crew that puts them up when they work.

And, at (Tr. 92-93):

JUDGE KOUTRAS: So if they are up there doing work then the roadway is not blocked?

THE WITNESS: No, it's not on the back side.

JUDGE KOUTRAS: Not on the back side?

THE WITNESS: Right.

MS. WITHEROW: Is the walkway blocked off?

THE WITNESS: The walkways are covered, both of them -- all three of them are covered.

MS. WITHEROW: We have heard testimony from two witnesses that there are parts of that walkway that are not covered.

THE WITNESS: The tripper belt is covered and your clinker belt where it used to be there's a walkway that we walk through, it's also covered.

But from going to the mill building, top of the mill building out to the footer building, it's not.

* * * * * * *

Q. So this walkway that Mr. Jones testified about, it was not -- it was open?

A. Well, it's got covers on your belt but it don't have a cover over your -- it's not a covered walkway.

Q. Fine. Were there any barricades or warning signs on that?

A. On this one (pointing)?

Q. On that walkway?

A. No.

Q. At any time?

A. No, not that I know of.

John Bayliss, respondent's maintenance manager, confirmed that he was familiar with the contractor performing work on the roof of the crane storage building prior to and after the time the citation was issued, and that he was aware of the contractor's "comings and goings." Mr. Bayliss stated that the contractor was not performing any work on the roof on the day that the citation was issued. He confirmed that all roofing contractors are given safety instructions, and they are instructed to wear hard hats, glasses, and hard-toes shoes, and that in the event they needed assistance or barricades they were to come to him. When asked whether or not barricades were installed when contractors were performing work at the plant, Mr. Bayliss stated as follows (Tr. 98):

A. Whenever they told us that they were in a problem, we installed barricades. When they were going to tear the junk -- they started off tearing the top off the roof, and then they lifted up the new supplies, and then they stuck these new supplies back on the roof. That was a job.

When they came to lift up the supplies, there were two different, separate times when they were lifting supplies up. One, they used a huge mobile crane, and the next time they used the rope down the side of the building.

Each time when they were using these things, we put barricades up. Bob works for me, and he put barricades up.

Mr. Bayliss stated that the roofing contractor in question usually had two or three workers working at one location on the roof, and in the event they were working and handling materials at the north end of the building, it would not be logical to rope off the south end. In his judgment, the only work area that needed to be roped off would be the area directly below where the roof work was being performed (Tr. 99).

Mr. Bayliss described the propane tank used by the contractor as "a small tank" weighing approximately 20 pounds (Tr. 100). He stated that prior to the issuance of the citation, the contractor had not worked at the plant for a week because the temperature was less than 40 degrees and that "we had been in limbo for a week here, waiting for the guy to come back and get his job done" (Tr. 101). Mr. Bayliss was of the opinion that there was no likelihood that the materials on the roof would have fallen off and that it was unlikely that an accident would have happened because the east side of the building is not a place where anybody would walk and that there are "very few people on foot. This is not a traveled area at any time as far as people walking" (Tr. 101).

On cross-examination, Mr. Bayliss confirmed that although he was at work on the day of Mr. Jones' inspection, he did not accompany him to the top of the roof, nor did he go to the roof on that day. Mr. Bayliss stated that he knew what was on the roof because "what's on the roof that day was on the roof the day before, and it was on the roof ever since we'd been on the roof so I knew exactly what was on the roof" (Tr. 101). Mr. Bayliss confirmed that he was on the roof at least once a week in order to insure that the work for which the contractor was being paid was done.

Mr. Bayliss confirmed that in addition to the 20 pound propane tank, another 60 pound propane tank was on the roof on the day of the inspection, and he agreed with the inspector's testimony concerning the presence of other materials such as

pails, roofing materials, and a hand truck on the roof (Tr. 106). With regard to the inspector's assessment of the hazard presented at the time of the inspection, Mr. Bayliss stated as follows (Tr. 106-107):

> JUDGE KOUTRAS: Now you also heard the inspector testify that if a wind came along and toppled over this sixty-pound propane tank that it could possibly roll off the roof, and if it did and fell to the ground below and struck a truck, it would cause certain damages; if it struck a person, it would cause certain things; and if it landed on its valve and it was full, it would likely or at least it was a possibility of it becoming airborne or whatever.
>
> Do you differ with the inspector on that? If this propane tank toppled, would it likely roll off the roof?
>
> THE WITNESS: I believe it might.
>
> JUDGE KOUTRAS: Was the pitch of the roof such that it would roll off?
>
> THE WITNESS: Well, you can see the roof. Any pitch on anything, if you roll a -- of course, I didn't see exactly where this sixty-pound tank was actually located on this day.
>
> JUDGE KOUTRAS: Where could it be located up there? Did they have any -- he said that the roofing material was in cardboard boxes and it was either perpendicular or positioned in such a way that that wouldn't roll off, that he wasn't concerned about the pails but he was concerned about this one propane tank and the hand truck.
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: Particularly with the propane tank. His testimony is that if the wind toppled the propane tank, it was in such a position that it would readily roll off the roof.
>
> THE WITNESS: I believe him.

When they came to lift up the supplies, there were two different, separate times when they were lifting supplies up. One, they used a huge mobile crane, and the next time they used the rope down the side of the building.

Each time when they were using these things, we put barricades up. Bob works for me, and he put barricades up.

Mr. Bayliss stated that the roofing contractor in question usually had two or three workers working at one location on the roof, and in the event they were working and handling materials at the north end of the building, it would not be logical to rope off the south end. In his judgment, the only work area that needed to be roped off would be the area directly below where the roof work was being performed (Tr. 99).

Mr. Bayliss described the propane tank used by the contractor as "a small tank" weighing approximately 20 pounds (Tr. 100). He stated that prior to the issuance of the citation, the contractor had not worked at the plant for a week because the temperature was less than 40 degrees and that "we had been in limbo for a week here, waiting for the guy to come back and get his job done" (Tr. 101). Mr. Bayliss was of the opinion that there was no likelihood that the materials on the roof would have fallen off and that it was unlikely that an accident would have happened because the east side of the building is not a place where anybody would walk and that there are "very few people on foot. This is not a traveled area at any time as far as people walking" (Tr. 101).

On cross-examination, Mr. Bayliss confirmed that although he was at work on the day of Mr. Jones' inspection, he did not accompany him to the top of the roof, nor did he go to the roof on that day. Mr. Bayliss stated that he knew what was on the roof because "what's on the roof that day was on the roof the day before, and it was on the roof ever since we'd been on the roof so I knew exactly what was on the roof" (Tr. 101). Mr. Bayliss confirmed that he was on the roof at least once a week in order to insure that the work for which the contractor was being paid was done.

Mr. Bayliss confirmed that in addition to the 20 pound propane tank, another 60 pound propane tank was on the roof on the day of the inspection, and he agreed with the inspector's testimony concerning the presence of other materials such as

presented at the time of the inspection, Mr. Bayliss stated as follows (Tr. 106-107):

> JUDGE KOUTRAS: Now you also heard the inspector testify that if a wind came along and toppled over this sixty-pound propane tank that it could possibly roll off the roof, and if it did and fell to the ground below and struck a truck, it would cause certain damages; if it struck a person, it would cause certain things; and if it landed on its valve and it was full, it would likely or at least it was a possibility of it becoming airborne or whatever.
>
> Do you differ with the inspector on that? If this propane tank toppled, would it likely roll off the roof?
>
> THE WITNESS: I believe it might.
>
> JUDGE KOUTRAS: Was the pitch of the roof such that it would roll off?
>
> THE WITNESS: Well, you can see the roof. Any pitch on anything, if you roll a -- of course, I didn't see exactly where this sixty-pound tank was actually located on this day.
>
> JUDGE KOUTRAS: Where could it be located up there? Did they have any -- he said that the roofing material was in cardboard boxes and it was either perpendicular or positioned in such a way that that wouldn't roll off, that he wasn't concerned about the pails but he was concerned about this one propane tank and the hand truck.
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: Particularly with the propane tank. His testimony is that if the wind toppled the propane tank, it was in such a position that it would readily roll off the roof.
>
> THE WITNESS: I believe him.

Mr. Bayliss stated that the propane tanks in question were not "tied off," that the contractor never tied them off, and that "if the inspector says it was up there when he saw it, I believe him" (Tr. 108). Mr. Bayliss agreed that the unsecured materials on the roof were left there by the contractor who intended to come back "the next day" or when "we got to some warmer weather" (Tr. 109). He confirmed that the materials were left on the roof for "a couple of weeks" and that "this job took like three months to complete" (Tr. 110).

Mr. Bayliss stated that the inspector was justified in issuing the citation and that his only difference with the inspector lies in "the likelihood of somebody getting hurt." Mr. Bayliss agreed with the inspector's view that an unsecured propane cylinder on a pitched roof could roll off, but disagreed with the inspector's belief that it was reasonably likely that it would fall off and hit someone (Tr. 112).

Petitioner's Arguments

Petitioner takes the position that the testimony in this case, including the testimony of the respondent's witness Bayliss, supports the inspector's finding that a violation of the cited standard occurred and that the propane tank located on the roof posed a hazard in that it could have toppled over and rolled off the roof. Given the inspector's testimony that the walkway was at no time barricaded, the testimony of Mr. Brock that trucks were on the roadway every 20 to 30 minutes driving along the unbarricaded roadway below the roof, and Mr. McFarland's admission that the roadway was not barricaded on the day of the inspection, petitioner concludes that it has established the fact of violation, and the fact that a hazardous condition was present at the time of the inspection and the issuance of the citation (Tr. 118-119).

Respondent's Arguments

The respondent asserted that the citation should be vacated because the inspector failed to follow the requirements of section 103(g)(1) of the Act which requires that any complaints concerning alleged violations of any mandatory safety standard be first reduced to writing and a copy furnished to the mine operator. Respondent argued that no written complaint was forthcoming at the hearing, that MSHA failed to produce any witness who may have complained to the inspector about the cited condition, and that the inspector would not have gone to the roof area but for this complaint. Respondent took the position that "everything from that point on is hearsay" (Tr. 119).

The respondent's second argument is that MSHA inspectors are issuing citations to contractors who are supposedly working at the plant, when in fact they are not present at the plant actually performing any work at the time of the inspection. Respondent's representative McCormac stated that "If we are going to have a citation written about contractors working, if the inspector does not see the work being done, then he can't write anything on them" (Tr. 113). Mr. McCormac asserted that the written condition described by Inspector Jones on the face of the citation states that the contractor "was working seventy-five feet above the ground" when in fact the contractor was performing no work on the day of the inspection (Tr. 115). Mr. McCormac concludes that the inspector's belief that the contractor was working on the day in question is based on speculation which is unsupported by any "concrete proof" (Tr. 120).

Finally, the respondent argues that with respect to the propane cylinder in question, since there was no one working on the roof, and since there was no evidence advanced with respect to any wind or adverse weather conditions which may have caused the cylinder to topple over and roll off the roof, there was no hazard. Absent any agent or event that would cause the cylinder to topple over from its upright position, respondent concludes that it was unlikely that an accident would occur. Mr. McCormac stated that in the absence of vacating the citation, it should at most be modified to a "non-S&S" citation, and he agreed that if the citation was initially classified as such "we would not be here today" (Tr. 120, 122).

## Findings and Conclusions

### Section 103(g)(1) Issue

Section 104(a) of the Act provides in relevant part that "if, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to the Act has violated this Act, or any mandatory health or safety standard, . . . , he shall, with reasonable promptness, issue a citation to the operator . . . ."

Inspector Jones confirmed that he visited the plant site on November 20, 1987, in his capacity as an inspector and special investigator for the purpose of conducting an investigation concerning a previously filed discrimination complaint. He explained that in the course of these duties it is not

unusual for him to receive information or complaints from employees with regard to alleged violative conditions which may be unrelated to his discrimination investigation. Unless the complaints concern an imminently dangerous condition, his normal procedure is to refer safety complaints to the inspectors who normally inspect the mine. However, since he was aware of the fact that MSHA had received prior employee safety complaints concerning the roofing contractor, and had conducted hazard inspections in response to those complaints, and since he was informed by a foreman that the contractor was working on the roof while he was there on November 20, 1987, Mr. Jones decided to inspect the roof area in question (Tr. 8-9).

Inspector Jones explained that the prior visits to the plant by other MSHA inspectors in response to written complaints concerning the contractor in question were in connection with complaints that contractor personnel were not wearing hard hats, hard-toed shoes, and glasses. The "negative findings" by the inspectors with respect to those complaints were based on the fact that the contractor was not working when the inspectors were on the site, and since the inspectors had no opportunity to observe the contractor's employees without the personal equipment in question they had no basis for supporting any citations (Tr. 36-38).

Inspector Jones confirmed that no one complained to him about any alleged violative conditions on the roof, and that he went there with Mr. McCormac after a foreman advised him that the contractor was on the mine site. The fact that Mr. Jones may have interrupted his discrimination investigation to visit the roof area is irrelevant. Mr. Jones was accompanied by a representative of the respondent and the citation which he subsequently issued was based on his personal observations of the conditions which prompted him to issue it. I find nothing onerous or procedurally defective in the action taken by Mr. Jones. As an authorized representative of the Secretary, Mr. Jones had a duty and obligation to issue the citation if in his judgment the conditions which he observed constituted a violation of the cited mandatory safety standard in question. The respondent's assertion that Mr. Jones' actions were "hearsay" because the petitioner failed to produce any written complaint or any witness who may have complained about the materials on the roof are not well taken. Mr. Jones' personal observations and testimony about the conditions which prompted him to act are not hearsay, and I accept as credible his explanation as to why he went to the roof. Under the circumstances, the respondent's arguments

that the citation is somehow defective and that Mr. Jones actions were procedurally improper ARE REJECTED.

The Inspector's Narrative Description of the Cited Conditions

The respondent is charged with a violation of mandatory safety section 30 C.F.R. § 56.20011, because of its alleged failure to install barricades or warning signs along the perimeter and approaches to the building where roofing materials were located on the pitched roof. The inspector was concerned that some of the materials on the roof, and in particular a hand truck and a large propane bottle or cylinder weighing approximately 60 pounds, and which was upright and unsecured, could have toppled over and rolled down the roof to the ground below striking passing vehicles or employees traveling along a roadway and conveyor walkway. Section 56.20011, provides as follows:

> Barricades and warning signs.
>
> Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.

The evidence in this case establishes that work was in fact performed by the roofing contractor prior to the day of the inspection by Mr. Jones, and that it continued for some time after the issuance of the citation. The evidence also establishes that the roofing materials found by Mr. Jones on the roof were being used by the contractor who interrupted the completion of the roofing job because of outside temperature conditions. The respondent's suggestion that the citation is somehow defective because of the misleading wording of the cited conditions by the inspector on the face of the citation is not well taken. While it is true that the citation issued by Mr. Jones which states that "a roofer contractor was working 75 feet above" the perimeter and approaches to the building gives the impression that work was taking place when Mr. Jones was on the roof observing the conditions, I find nothing in the cited standard that conditions a violation on the fact that work may or may not be ongoing.

The gravamen of the requirement for barricades or warning signs lies in the existence of safety hazards not immediately obvious to employees. The critical issue is the existence of

the hazard, and the fact that no roofing work was taking place at the precise time of the inspection is irrelevant to any determination as to whether or not the affected area in question was barricaded or posted with warning signs. However, the fact that no work was taking place may or may not be relevant in any determination as to the degree of the hazard, and the likelihood of an accident occurring. Accordingly, the respondent's assertion that the "speculative" words used by the inspector conveying the impression that work was actually taking place when he viewed the conditions supports a dismissal of the citation IS REJECTED.

Fact of Violation

The unrebutted evidence in this case clearly establishes the existence of unsecured materials on the roof of the mill building. The roof was approximately 75 feet off the ground, and it was "pitched" or "peaked" as depicted by the photographic exhibits of record, and the building was several hundred feet long. The evidence also establishes that the materials which were of concern to the inspector consisted of an unsecured 60-pound propane tank or bottle, and a small unsecured hand truck, both of which remained on the roof for a relatively long period of time during which the roofing contractor performed no work on the roof because of adverse outside temperature conditions.

Inspector Jones testified that given the pitch of the roof, and the fact that the unsecured propane bottle was located "in a straight-line relationship" to an elevated conveyor located below the roof, he was concerned that if the bottle were to fall over and roll off the roof, it could strike the conveyor walkway, a portion of which was uncovered, as well as mine personnel walking along the base of the building, and vehicles passing by on a ground level roadway adjacent to and below the roof of the building. Respondent's maintenance manager John Bayliss agreed with the inspector's belief that in the event the unsecured propane bottle were to topple over, it could readily roll off the pitched roof to the ground below. He also agreed that the inspector was justified in issuing the citation. Given these undisputed facts, I conclude and find that the unsecured propane bottle and hand truck in question posed a potential safety hazard.

Although the evidence establishes that no one was working on the roof at the time of the inspection and issuance of the citation, respondent's welder and repairman William Brock testified that a dust truck travelled the roadway every 30 minutes, and that respondent's employees would occasionally

be on foot on the roadway. He also testified that respondent's employees would have occasion to walk the partially unprotected conveyor walkway during the course of their daily work shift, and that contractor vehicles would also use the roadway. Inspector Jones testified that service and maintenance personnel would have occasion to travel the conveyor walkway while servicing the conveyor systems. This testimony is unrebutted, and I conclude and find that these employees and vehicles would be exposed to the potential hazard in question.

Although Mr. Bayliss testified that he knew that the materials cited by Inspector Jones were on the roof, there is no credible evidence that any other employees were aware of the fact that these materials were there. Inspector Jones testified that employees working below the roof of the building or travelling along the conveyor belt or roadway would not be able to see the materials unless they were out for some distance away from the building, and that they would not be able to see anything rolling or falling off the roof and would have no warning if this were to occur. Given the dimensions of the building in question, the location of the materials at the apex of the roof which was approximately 75 feet off the ground, and the location of the roadway and conveyor belt at the base of the building, I conclude and find that employees on foot or in vehicles at those locations would not likely be aware of the unsecured materials on the roof and that the existing hazard presented by the unsecured propane bottle and hand truck would not be immediately obvious to them.

The undisputed evidence establishes that the roadway and conveyor areas at the base of the building and below the roof area where the unsecured propane bottle and hand truck were located were not barricaded or otherwise posted with warning signs during the time that these materials were left on the roof by the roofing contractor. Although the respondent's evidence reflects that barricades were normally erected while work was being performed on the roof or roofing materials were being hoisted to the roof, it seems clear to me that they were not in place during the existence of the hazard.

Given the existence of a safety hazard which was not immediately obvious to employees, and the fact that no barricades were erected, or warning signs posted in the areas exposed to the hazard during the time the unsecured propane bottle and hand truck remained on the roof, I conclude and find that the respondent violated the requirements of mandatory safety standard 30 C.F.R. § 56.20011. Accordingly, the citation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Jones confirmed that the rolled roofing materials, 5-gallon pails, and small 20-pound propane bottles which he found on the roof were adequately stored and secured and did not pose a hazard. His principal concern was the unsecured free-standing 60-pound propane bottle which was located on the sloped portion of the roof. Although Mr. Jones alluded to his concern for the unsecured hand-truck, I find no credible evidence to support a conclusion that it was reasonably likely that this truck would fall or roll off the roof and strike and injure someone.

With regard to the unsecured propane bottle, respondent's own witness John Bayliss confirmed that it remained on the roof for "a couple of weeks" when no work was in progress on the roof. Mr. Bayliss also agreed with the inspector's conclusion that given the position of the bottle on the pitched roof, if it were to topple over it would readily roll off the roof. Mr. Bayliss also confirmed that the contractor in question never tied off or secured any of its propane tanks, and Inspector Jones confirmed he cited the contractor for not securing the bottle and for several additional unsafe work practices in connection with the work being performed on the roof.

The respondent argues that in the absence of any work in progress on the roof at the time of the inspection, and the lack of any agent or event to cause the bottle to be placed in motion and roll off the roof, the violation is not significant or substantial. I disagree. In my view, the free-standing and unsecured 60-pound cylindrically shaped propane bottle located on the pitched portion of the roof which was approximately 75 feet above an unbarricaded area where employees and traffic would be present on a daily basis created an inherent and discrete potential safety hazard regardless of the presence of any independent agent or event to place the bottle in motion. The unsecured bottle was on the pitched portion of the roof for a relatively long period of time, and it was not readily observable from the ground level roadway or conveyor areas which should have been barricaded or otherwise posted with warning signs. If the bottle were to topple over, it would readily roll off the roof and possibly strike an

employee walking along the base of the building or a vehicle passing along the roadway. If this were to occur, I believe that one may reasonably conclude that serious or fatal injuries would result. Under all of these circumstances, I agree with the inspector's significant and substantial finding, and IT IS AFFIRMED.

History of Prior Violations

The parties stipulated that the respondent had 13 assessed violations for the 24-month period preceding the issuance of the citation in this case. I find that the respondent's history of compliance is not such as to warrant any additional increase in the civil penalty assessment which has been made for the violation in question.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

Based on the stipulations by the parties, I conclude and find that the respondent is a medium-size mine operator, and that the payment of the civil penalty assessment in this case will not adversely affect its ability to continue in business.

Gravity

On the basis of my findings and conclusions affirming the inspector's "significant and substantial" finding, I conclude that the violation was serious. The unsecured propane bottle in question presented a hazard to mine employees and vehicles using the roadway at the base of the building some 75 feet below the roof where the bottle was located.

Negligence

Inspector Jones made a finding of "moderate negligence," and he confirmed that he did so on the basis of mitigating circumstances. He explained that the contractor created the hazard, and the record shows that he cited the contractor for not securing the bottle. Insofar as the respondent is concerned, although Mr. Jones believed that it had an obligation to check on the contractor to determine whether it was creating any hazards to miners, he considered the fact that the respondent did not recognize any hazard (Tr. 29-31). I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and the inspector's negligence finding is affirmed.

Good Faith Abatement

The parties stipulated that the respondent demonstrated good faith in immediately abating the violation. I adopt this stipulation as my finding on this issue.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $150 is reasonable and appropriate for the violation which has been affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $150 for a violation of mandatory safety standard 30 C.F.R. § 56.20011, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Mary Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Robert K. McCormac, Industrial Relations Manager, Blue Circle Incorporated, 2609 N. 145th E. Avenue, Tulsa, OK 74116 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 9 1989

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 88-77<br>A.C. No. 05-02421-03518 |
| v. | : | Eastside Mine |
| EASTSIDE COAL COMPANY, INC., Respondent | : | |

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb, Glenwood Springs, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the operator of the Eastside Mine with violating two safety regulations of 30 C.F.R §§ 70.508 and 49.38 and with a failure to abate these violations. MSHA issued two 104(a) Citations and later two 104(b) Orders for failure to abate the violations.

The operator filed a timely appeal contesting the existence of the alleged violations and raising five affirmative defenses. The case was set for hearing on the merits at the same place and time as other cases involving the parties were heard on the merits. At the hearing, the parties advised they had reached settlements resolving all issues and were prepared to make their recommendations on the record.

Eastside is a small underground coal mining operation. It is developing a coal seam situated in the Grand Hotback, near the town of Silt, Garfield County, Colorado. It employees five (5) persons.

Citation/Order No. 9996145 involved an alleged failure to have qualified or certified personnel take noise samples. In preparing the case for trial the Secretary found the original 104(a) citation was valid but that there was insufficient evidence to go forth with the 104(b) order issued for the alleged failure to abate. The parties agreed and jointly moved that the Secretary be permitted to vacate the 104(b) order and with respect to the 104(a) citation amend the proposed penalty (which was a combination penalty for the citation and the order) from $170.00 to $85.00. The motions with respect to citation/order No. 9996145 were granted and respondent with approval of the court withdrew its notice of contest to the citation and its related amended penalty.

With respect to Citation/Order No. 3043534 the parties jointly moved to vacate the 104(b) order, leaving in place the 104(a) citation, and to amend the proposed penalty for the citation and order from $255.00 to $128.00. This reduced penalty relates solely to the 104(a) citation. The Secretary's counsel stated for the record that the 104(a) citation was appropriate but on review of the evidence it was determined that the 104(b) order was not. Respondent withdrew his contest to the citation and its related amended penalty.

I accept the representation of counsel that there is insufficient evidence to establish the failure to abate Order Nos. 3044011 and 3044012 and grant the motion to vacate said orders. I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act.

Accordingly, the joint motion for approval of the settlement made at the hearing is granted, the settlement is approved and respondent is ordered to pay the sum of $213.00 within 40 days of the date of this Order.

August F. Cetti
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Edward Mulhall, Jr., Esq., Delaney & Balcomb, Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

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OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 9 1989

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. WEST 88-92<br>A.C. No. 42-00121-03659 |
| v. | : | Deer Creek Mine |
| UTAH POWER & LIGHT COMPANY, Respondent | : | |

DECISION

Appearances: Susan J. Bissegger, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Thomas C. Means, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties a hearing on the merits was held in Denver, Colorado on June 8, 1988.

The parties filed post-trial briefs.

Summary of the Case

Citation No. 3044971 charges respondent with violating 30 C.F.R. § 75.1714. The cited regulation provides as follows:

> § 75.1714 Availability of approved self rescue devices; instruction in use and location
>
> (a) Each operator shall make available to each miner employed by the operator who goes underground and to visitors authorized to enter the mine by the operator a self-rescue device or devices approved by the Secretary which is adequate to protect such person for one hour or longer.

(b) Before any miner employed by the operator or visitor authorized by the operator goes underground the operator shall instruct and train such person in the use and location of the self-rescue device or devices made available at the mine. Instruction and training of miners and visitors shall be in accordance with provisions set forth in 30 CFR Part 48.

## Stipulation

At the commencement of the hearing the parties stipulated as to the admissibility of certain documents and factors relating to the assessment of a civil penalty (Tr. 4-7).

## Findings of Fact

The Secretary's evidence shows that on October 8, 1987 MSHA Inspector Robert L. Huggins tested 15 miners at the Deer Creek Mine to determine if they were properly trained in the use of self contained self rescue devices (SCSR's) (Tr. 18-23). The miners, selected at random, were quizzed by the inspector from a list of structured questions prepared by MSHA's administrator (Tr. 21-24; Ex. P2).

Before he interviewed the miners the inspector reviewed the MSHA memorandum which contains instructions for scoring the results (Tr. 23, 26).

When the inspector found that three of the fifteen miners did not pass the test he issued a citation to UP&L. He believed the three miners were not properly trained on the SCSR storage plan and did not know how long the SCSR would last before exhausting its supply of oxygen (Tr. 45, 49, 54).

The inspector agreed that MSHA's ETS (emergency temporary standard), adopted June 30, 1987, does not refer to the storage plan or the amount of time available when the SCSR is used (Tr. 70).

As a result of his quiz the inspector failed Eddie Wall (shear operator), Eddie Johnson (laborer) and Gordon Ungerman (head gateman on the longwall) because they had two questions wrong. (Tr. 56, 84; Ex. P2, P4, P5, P6).

The three miners could not answer the two following questions: (1) How far from an SCSR can you work while underground? and (2) An SCSR provides protection from bad air for at least how long?

If one question is incorrect a miner could score a 40. If two questions were wrong a miner could score 30. However, the

scoring instructions provide that if a miner misses more than two interview questions he fails the test (Tr. 85, 86). The inspector had some difficulty with inconsistent instructions as to the manner of grading the miners' answers Tr. 85, 90; Ex. P2).

If three people failed out of fifteen this would be an 80 percent passing rate (Tr. 94).

When he interviewed the miners the inspector felt that Eddie Johnson was really nervous; further, Eddie Wall may have gotten a little nervous (Tr. 40, 41). Miner Ungerman indicated he should have known the answers or retained the knowledge (Tr. 40). A lot of the miners (of those tested) did not know the SCSR storage plan at the mine (Tr. 44).

UP&L's witnesses consisted of Terry L. Jordan, John Pressett and Dave Lauriski.

JORDAN, UP&L's chief safety engineer and a person experienced in mining and safety, has been involved with SCSR devices since they were required in the early 1980's (Tr. 99-102).

Since 1986 there have been five or six "hands on" training sessions. Every aspect of the SCSR requirements, including the storage plan of the devices and their duration, was covered (Tr.105). When the miners received their annual refresher training each of them was also given a map showing the location of the SCSRs (Tr. 105).

The annual refresher training is different from the special "hands on" training given twice a year on the SCSRs. During the annual refresher training the instructor demonstrates how to don the SCSR. He also covers the storage plan location and the duration of the SCSR. Training of this type took place in 1987 before the citation was issued. The class consisted of 15 to 20 miners (Tr. 105-107).

Previously several people, including an MSHA training instructor, commended favorably on the quality of the training (Tr. 108, 122).

Records reviewed by the witness contain summaries of the training received by Johnson, Wall and Ungerman from 1987 before the instant citation was issued (Tr. 120; Ex R10). The summary and the task training forms indicates the following training:

| NAME | DATE | INSTRUCTOR | TYPE OF TRAINING |
|---|---|---|---|
| Eddie Wall | 3/13/87 | Gary Christensen | Hands on - Storage plan & duration of use, donning of SCSR |
| | 4/3/87 | Herman Nava<br>Jon Pressett | Annual Refresher - Storage plan & duration of use, demonstration of donning |
| | 7/21/87 | Jon Pressett | Hands on storage plan & duration of use, donning of SCSR. |
| Eddie Johnson | 7/27/87 | Jon Pressett | Newly employed experienced miner, hands on-storage plan & duration of use, donning of SCSR |
| | 9/25/87 | Jon Pressett | Annual refresher storage plan, duration of use, demonstration of donning. |
| Gordon Ungerman | 3/6/87 | Gary Christensen | Hands on-storage plan & duration of use, donning of SCSR. |
| | 4/3/87 | Herman Nava | Annual refresher storage plan, duration of use, demonstration of donning |
| | 7/21/87 | Jon Pressett | Hands on-storage plan & duration of use, donning of SCSR. |

(Exhibit R10)

Prior to receiving the instant citation the witness didn't have any knowledge indicating the miners did not know the location of the SCSRs (Tr. 123). They received maps showing the location of the SCSRs throughout the mine (Tr. 123).

The witness admitted that Pressett, Christensen and Nava were not included on the current valid training list but they were qualified and their names had been submitted to MSHA (Tr. 147). MSHA had indicated if the names of the individuals doing the teaching had been previously submitted they are approved with retroactive effect. Exhibit R7 lists Pressett and Christensen as approved instructors by a letter dated February 4, 1987 (Tr. 148-149; Ex. R7).

Witness JON PRESSETT, a UP&L safety engineer has been an MSHA approved instructor since October 1979 (Tr. 152, 153).

The witness has done "hands-on" training with miners throughout the mine (Tr. 155-159). Among other facets the training also locates the storage plan on a mine-specific basis (Tr. 160-163). Initially maps were given out and later updated when the belt lines were extended (Tr. 164).

The miners are instructed in the duration of the unit during the "hands-on" training session (Tr. 164). In addition to "hands on" training the company also gave annual refresher training classes. At the annual sessions the storage plan was reviewed in detail and maps were distributed. Team competition and multiple choice tests were used to determine whether the miners had absorbed the information (Tr. 166-168).

Pressett trained Eddie Wall and Gordon Ungerman in annual retraining (Tr. 169, 170; Ex. R13). Seven and one-half hours of Ungerman's training was completed April 3, 1987 (Tr. 175). At the time of the annual refresher training given to Wall and Ungerman in April 1987 the storage plan with an exact map was given the miners, also they discussed the donning of the unit (Tr. 177-178; Ex. R11). In a test given by UP&L miner Wall indicated the SCSR could be used for 60 minutes. In addition, he correctly answered questions relating to the storage plan and the location of the SCSRs underground (Tr. 181, 182).

Ungerman and Wall were in the same training class. Ungerman in a test (by UP&L) correctly indicated the unit would last 60 minutes (Tr. 183, 184).

When Ungerman and Wall completed their SCSR training on April 3, 1987 they were both knowledgeable in the location of the equipment and the duration of its use. The UP&L tests also establish these facts (Tr. 186).

The witness also trained Eddie Johnson who received newly employed miner training as well as an annual retraining class

units (Tr. 195). Eddie Johnson was also given a map showing where the units are stored underground (Tr. 196). Johnson didn't have any particular problems at the end of the training session (Tr. 198; Ex. R16).

He was knowledgeable in the location, storage, duration and care of the SCSRs (Tr. 202). Miners returning to work received double training if they have been off a year or more (Tr. 201; Ex. R18).

DAVE LAURISKI, UP&L's director of safety and training, is responsible for compliance with all provisions of Title 30 C.F.R. (Tr. 226, 227).

The company conducted "hands-on" training for the emergency SCSR regulation. In 1987 the employees were trained three separate times (Tr. 230).

It is common that the company's list of MSHA approved instructors is not up to date on a daily basis. When MSHA orally approves an instructor his name is not entered on the training plan until the next update (Tr. 233, 234).

## Discussion

The rule of law is clear: in interpreting a regulation it is necessary to give effect to the plain meaning of its words. Diamond Roofing Co., Inc., v. OSHRC, 528, F.2d 645, 649 (5th Cir. 1976); Usery v. Kennecott Copper Corp., 577, F.2d 1113, 1119 (10th Cir. 1977); KCMC, Inc., v. FCC, 600 F. 2d 546, 549 (5th Cir. 1979).

In the instant case 30 C.F.R. 75.1714(b) requires an operator to "instruct [1]/ and train [2]/ in the use of SCSRs. The evidence shows that UP&L did "instruct and train" its miners and particularly miners Wall, Johnson and Ungerman. In fact, the evidence is uncontroverted that UP&L's instructions and training exceeded MSHA's requirements [3]/ (Tr. R9-R14, R16-R18).

1/ Instruct, to give knowledge or information to; Webster's New Collegiate Dictionary, 1979 at 594.
2/ Train: to form by instruction discipline or drill; Webster's New Collegiate Dictionary, 1979 at 1229.
3/ UP&L instituted "hands-on" training for all of its miners over one year before such training was mandated by law (Tr. 130, 131, 229). UP&L emphasizes to all of its miners that any miner may seek individual instruction on proper donning procedures at any time from the safety department or he may simply practice donning an SCSR at any time at the safety department (Tr. 193).

It is the Secretary's position that UP&L failed to adequately train miners Wall, Johnson and Ungerman in the use and location of the SCSRs and therefore violated 30 C.F.R. § 75.1714(b)

The Secretary's approach of interviewing miners to test their knowledge certainly probes the extent to which the operator has instructed its miners. But the Secretary's argument cannot prevail. On the record presented here the failure of Wall, Johnson and Ungerman to demonstrate their knowledge in a more persuasive fashion does not establish that UP&L violated the regulation.

Specifically, the regulation does not require that miners demonstrate their knowledge of information relating to the use and location of SCSRs, either at the time of the training or at some later time.

In other situations the Secretary has mandated that knowledge requirements be demonstrated. For example: 30 C.F.R. § 48.7(b) requires that "miners ... shall not operate the equipment ... until such miners have demonstrated safe operating procedures ..."; further, 30 C.F.R. § 75.153(a)(3) [in electrical work] requires "... he attains a satisfactory grade on each of the series of five written tests ..."; further, in 30 C.F.R. § 77.102 [tests for methane, etc] "... no person shall be a qualified person for testing for methane ... unless he has demonstrated ..."; further, 30 C.F.R. § 57.19096 [familiarity with signal code] requires "... person responsible ... shall be familiar with the posted signaling code".

When § 75.1714 is read in conjunction with 30 C.F.R. Part 48 it is apparent that the regulations contain a comprehensive framework for miner training programs covering the range from new miner training to hazard training. However, the regulations are conspicuously silent as to what constitutes "adequate" training. This qualitative judgment is apparently left to the discretion of the operator who would be more familiar with specific conditions in its mines and the training needs of its work force.

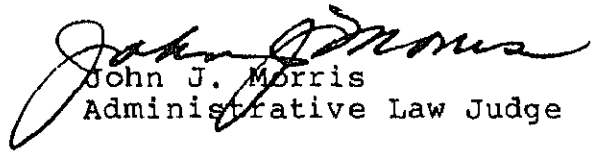
However, for the reasons stated above, I conclude that UP&L did "instruct and train" its miners within the meaning of § 75.1714. Accordingly, it follows that the citation should be vacated.

UP&L raises additional issues concerning the Secretary's guidelines for scoring the answers to the interview questions, and concerning an appropriate remedy for the violation of a training plan. However, inasmuch as UP&L has prevailed on the merits, it is not necessary to review these secondary issues.

For the foregoing reasons I enter the following:

ORDER

Citation No. 3044971 and all penalties therefor are VACATED.



John J. Morris
Administrative Law Judge

Distribution:

Susan J. Bissegger, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Thomas C. Means, Esq., Ann R. Klee, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2505 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

JAN 13 1989

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDINGS. |
| | : | Docket No. WEST 88-21 |
| | : | A.C. No. 05-03455-03554 |
| v. | : | Docket No. WEST 88-52 |
| | : | A.C. No. 05-03455-03555 |
| ENERGY FUELS COAL, INC., Respondent | : | Southfield Mine |

DECISION

Appearances: James H. Barkley, Esq., Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, Denver, Colorado, for Respondent.

Before: Judge Cetti

These cases are before me on petition for civil penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "ACT"), charging the Energy Fuels Coal, Inc., (Energy) with violating five certain mandatory regulatory standards found in 30 C.F.R. and proposing certain civil penalties for the alleged violations. Pursuant to notice, the cases were set for hearing on the merits.

DOCKET No. WEST 88-21

This docket has four citations. Citation No. 2839449 alleges a significant and substantial violation of 30 C.F.R. § 75.1105. Citation Nos. 2839451 and 2839452 allege violations of 30 C.F.R. § 75.323 and Citation No. 2839454 alleges a wire bushing violation of 30 C.F.R. § 75.505.

After taking several hours of testimony there was a recess during which the parties discussed settlement. On the record counsel for the Secretary advised that due to the insufficiency of the evidence the Secretary moved to vacate Citation No. 2839451 and 2839452, there was no objection to the motion and the motion was granted.

With respect to Citation No. 2839449 the Secretary moved to amend the citation to delete the allegation characterizing the violation as "significant and substantial". Respondent in turn withdrew its notice of contest to that citation as amended and agreed to pay the $85.00 original proposed civil penalty. Counsel for the Secretary stated that the gravity of the violation was less than originally assessed.

With respect to Citation No. 2839454 alleging a wire into a junction box was not properly bushed, the respondent withdrew its notice of contest to the citation and to the Secretary's original proposed civil penalty.

Citation Nos. 2839451 and 2839452 allege a violation of 30 C.F.R. § 75.323 which requires certain reports to be countersigned "promptly" by the mine foreman. After taking considerable testimony the Secretary moved to vacate the Citation Nos. 2839451 and 2839452. There was no objection and the motion was granted.

DOCKET NO. WEST 88-52

Citation No. 2939404 alleges a violation of 30 C.F.R. § 77.700 which requires grounding of metallic sheaths, armors and conduits enclosing power conductors. The respondent moved to withdraw its contest to the alleged violation and the Secretary's proposed penalty. There was no objection and the motion was granted.

ORDER

Citation No. 2839449 as amended to delete the S&S characterization and Citation Nos. 2839454 and 2939404 are affirmed. Citation Nos. 2839451 and 2839452 and their related proposed penalties are vacated. Energy Fuels Coal Inc. if it has not already done so is directed to pay civil penalties in the sum of $125.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Phillip D. Barber, Esq., Welborn, Dufford, Brown & Tooley, 1700 Broadway, Suite 1100, Denver, CO 80290-1199 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 17 1989

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| GERARD SAPUNARICH, Complainant | : | DISCRIMINATION PROCEEDING |
| v. | : | Docket No. YORK 88-29-DM |
| LEHIGH PORTLAND CEMENT COMPANY, Respondent | : | MD 87-56 |
| | : | Cementon Plant and Quarry |

DECISION

Appearances: Robert G. Rothstein, Esq., Meranze and Katz, Philadelphia, Pennsylvania for Complainant; Thomas Connolly, Esq., McNamee, Lochner, Titus & Williams, P.C., Albany, New York for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Gerard Sapunarich under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that he was suspended from his job without pay by Lehigh Portland Cement Company, (Lehigh) in violation of section 105(c)(1) of the Act.1/

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1/ Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject

In particular Mr. Sapunarich alleges that he was the Miner Safety Representative during relevant times and that in that capacity reported various health and safety violations from February 3, 1983, through September 11, 1987, to both officials of the Federal Mine Safety and Health Administration (MSHA) and of the mine operator. He alleges in his complaint that "on Friday, September 11, 1987, John Jones [plant manager] and I had a very heated discussion in the Control Room about the dust problem in the dust building that was still going on from the previous day. As a result I have been written up for insubordination and it was put in my file, also I have been suspended without pay."

Lehigh admits that Sapunarich was suspended for three days without pay but maintains that the suspension was not in any way motivated by his complaints about the dust situation but rather was based solely upon threatening and abusive language directed to Plant Manager John Jones during the confrontation on September 11, 1987, in the control room.

In establishing a prima facie case of discrimination under section 105(c)(1) of the Act the Complainant must prove that (1) he engaged in a protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800, (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18, (1981). The Respondent mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected

(footnote 2 continued)
of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38, (1982).

It is undisputed in this case that the Complainant had been an active and effective miner safety representative at the Cementon Plant for many years preceding the incident in question. He was and is highly regarded by both wage and salaried workers. Indeed Donald Reid the Cementon Plant Safety and Training Supervisor testified that Sapunarich had a genuine concern for miner safety and did an excellent job as safety representative.

It is further undisputed that shortly before the critical September 11, 1987, confrontation at issue herein, Sapunarich made several specific complaints involving health and safety. On at least one occasion he complained to Plant Manager John Jones about foreign cement bags that were exploding. Moreover, only two days before the confrontation he complained to Company Supervisor Ron Dumond about excessive dust emanating from the precipitator building. On the following day he complained about the dust to the New York State Department of Environmental Conservation and to the local office of the Federal Mine Safety and Health Administration (MSHA).

Sapunarich arrived at the plant at around 6:30 a.m. on September 11, 1987, and found that the dust problem had still not been corrected. After checking at the laboratory he proceeded to the control room where he met Jones. The subsequent events were described by Sapunarich in the following colloquy at hearing:

Q. (By Complainant's Counsel) When you got finished coversing with Mr. Goff did you have any conversations with Mr. Jones?

A. Yes.

Q. Did you address him, or did he address you?

A. He said good morning to me.

Q. What did you say, if anything?

A. I said, "What is so good about it?" He said, "What is the problem?" I said, "The problem is you got a pretty bad dust condition here and it doesn't seem as if anybody is doing anything about it," and he

said, "Well, I am doing the best I can," and I said, "Evidently the best you can is not good enough because it is still not corrected," and he said, "Well, what do you want me to do, wave a fucking magic wand?"

Q. He said what?

A. He said, "What do you want me to do, wave a fucking magic wand or I don't have a fucking magic wand." I think that was it, "I don't have a fucking magic wand." I slapped the top of the desk and told him, I said, "I would like to choke you. You are the worst plant manager I have ever had to deal with. You don't give a shit about the people that work here at the plant, and you don't care about the people of Cementon," and we were both talking at the same time or rather arguing.

Q. Was that the extent of the conversation?

A. Well, it was more than that. I told him about the men's vehicles out in the parking lot and that there was no consideration for those vehicles out there. Some people had automobiles and trucks out there worth eighteen/nineteen thousand dollars and that nobody seemed to care about them, and that as far as the men go I told him that I requested that nobody be sent into that building under those conditions and nobody seemed to care. They still sent two laborers in there the night before, and it just seemed that no matter what we were complaining about this month that nobody was listening.

Q. How far away from Mr. Jones were you standing -- or were you standing when you had your conversation with Mr. Jones?

A. We were on opposite sides of the control room panel.

Q. Were you standing?

A. It is not just a desk; it is a desk with big wings on it because there is controls

on both sides. So he is standing about in this alleyway over here (indicating), and I am where I am at, and there is a desk between us about that big (indicating), but it has got big wings on it with high panels on it (indicating).

Q. Could you estimate how far away you were?

A. I was from him?

Q. Yes.

A. Straight across?

Q. Yes.

A. Five/six foot.

(Tr. 58-61).

Floyd Falk the control room operator, was also present at the time of this confrontation. He generally supports the Complainant's version except he did not recall hearing the Complainant say that he would like to get his hands around Jones' neck. Robert Hinckley, also testifying on behalf of the Complainant, was also in the control room at the time of the confrontation. He too generally supports the Complainant's version on the confrontation and further noted that "both [Sapunarich and Jones] were loud and neither was holding anything back".

Plant Manager John Jones reported the confrontation somewhat differently. He noted the events leading up to the confrontation and the confrontation itself in a memorandum prepared later the same day. It reads as follows:

> We were experiencing problems with the kiln dust handling system on 9/10/87. The elevators and conveying system were dusting and the dust appeared to be difficult to handle. We were not sure of the cause, but proceeded to inspect the precipitator, dust handling system, 02 analyzer and everything we could associated (sic) with the process. We also called the local DEC (New York State Department of Environmental Conservation) Inspector and informed him of our problem and that we were attempting to resolve the situation.

Late in the day of 9/10/87 we decided that the dust handling system was not at fault and we decided that maybe the surry thinner we had used was causing the problem. In order to verify that, we decided to switch basins (kiln feed) but had to wait until sufficient quantity was on hand to make the switch. We made the switch at 7:00 AM on 9/11/87.

At approximately 7:30 AM, 9/11/87, G. Sapunarich, Lubricator, came into the Control Room and was discussing the situation with J. Goff, M & E Repairman.

Jones: "Good Morning, Gerry."

Sapunarich: "It isn't a very good morning."

Jones: "Why not?"

Sapunarich: "Because of the Dust Situation."

Jones: "We have been trying to resolve the proble [sic]. We inspected the elevator, precipitator, and screws. We have been checking out the process equipment. We are not sure what the problem is."

Sapunarich: "That's not good enough, 24 hours is long enough to resolve the problem. I intend to call DEC and report this situation."

Jones: "DEC was contacted and informed of the problem. We are now changing slurry basins to see if that resolves the problem. Maybe the slurry thinner is causing the problem. I don't know, we are trying systematically (sic) eliminate the possibilities."

Sapunarich: "DEC doesn't react to these problems and neither do you. I am concerned about the residents of Cementon and all the dust they are exposed to. I am building a home and have a new car that is being ruined. I am not getting any cooperation from you or the local DEC. I intend to call Schenectady to get some action."

NOTE: As Sapunarich is speacking, [sic] he is becoming increasingly agitated and loader [sic].

Jones: "Do what you feel you have to do, but in the meantime, go back to your job and do the work you are getting paid to do."

NOTE: At this point Sapunarich pounded the table and leaning (sic) across the Control Room table with arms extended:

Sapunarich: "I would like to grab you by the neck." You don't give a fuck about the dust situation. I'll get you 'off' the plant property."

NOTE: At this point, I explained again the steps we were taking to resolve the problem.

Jones: "I have no magic wand. Do you have any idea what is causing the problem?"

Sapunarich: "You are ruining my house, my car and my windows. I'll get you off the plant property."

NOTE: At this point I became very upset and told Sapunarich very loudly:

Jones: "Don't you ever threaten me. If you don't stop you may lose your job."

Sapunarich: (Very loud and threatening) "I'll get you 'off' the plant property. If you're going to fire me, do it."

NOTE: At this point Sapunarich left the Control Room.

(See Exhibit R-13).

David Mower a Process Foreman at the Lehigh Cementon Plant was also in the Control Room during the confrontation. His testimony generally supports Jones' version of the event and in particular corroborates that the Complainant threatened Jones with bodily harm off the plant property. In particular Mower recalled that Sapunarich "pounded the table shouting more threats of bodily harm off company property and it looked very much like he would... carry out his threat right there."
(See Exhibit R-2).

In evaluating the evidence concerning the critical events at the confrontation between the Complainant and Plant Manager Jones on September 11, 1987, I give particular weight to the testimony and contemporaneous statements of Jones and

Mower. These witnesses were the only ones to have made notes closely following the event and which fully support their testimony at hearing. It is also significant that the Complainant also admits slapping the desk in front of Jones and threatening that he would like to choke him.

Within this framework I find that Jones' statement most accurately represents what happened at the confrontation. It is therefore clear that the Complainant did in fact use threatening language toward Jones. These actions clearly constituted grounds for disciplinary action, including suspension, set forth in Lehigh's rules of conduct (Exhibit R-8, ¶8) and therefore provided a legitimate business-related grounds for the Complainant's three day suspension.

While it is clear that both before and during the confrontation the Complainant also made safety and health related complaints concerning the dust and other problems at the plant, activities clearly protected under the Act, the Act does not grant miners immunity from discipline if in conjunction with these protected activities they threaten other miners. Considering the credible evidence in this case I do not find that the disciplinary action taken was in retaliation for any health or safety complaints but was proportionate to and directly related to the threats to the plant manager. In reaching this conclusion I have also considered that while Sapunarich had for years been an active miners safety representative there is no credible evidence of any retaliation by Lehigh for such activities over the years. Indeed I find no credible evidence of any anti-safety animus on the part of Lehigh. I have also not disregarded the evidence of other incidents involving profane and abusive language at the Cementon Plant. None of those incidents however involved direct threats of such a personal, immediate and serious nature as in this case. Accordingly I find that while the Complainant herein did engage in protected activity and suffered adverse action, the Respondent has demonstrated that the adverse action was not motivated in any part by the protected activity. This case must therefore be dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Robert G. Rothstein, Esq., Meranze and Katz, Lewis Tower Building, N.E. Cor. 15th & Locust St., Philadelphia, PA 19102 (Certified Mail)

Thomas P. Connolly, Esq., McNamee, Lochner, Titus & Williams, P.C., 75 State Street, P.O. Box 459, Albany, NY 12201-0459 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 19 1989

| | | |
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| MATHIES COAL COMPANY, Contestant | : | CONTEST PROCEEDING |
| v. | : | Docket No. PENN 88-36-R |
| | : | Order No. 2936667; 10/6/87 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Mathies Mine |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. PENN 88-154 |
| | : | A.C. No. 36-00963-03684 |
| v. | : | |
| MATHIES COAL COMPANY, Respondent | : | Mathies Mine |

DECISION

Appearances: Anne Gwynne, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Secretary;
Joseph Mack, III, Esq., Thorp, Reed & Armstrong, Pittsburgh, Pennsylvania, for Mathies Coal Co.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant, Mathies Coal Company (Mathies) has filed a notice of contest challenging the issuance of Order No. 2936667 at its Mathies Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $1100 for the violation charged in the above contested order as well as another violation charged in Citation No. 2939096 which was not separately contested, but which violation is generally denied by Mathies.

Pursuant to notice, the cases were heard in Washington, Pennsylvania on July 21, 1988. Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

## STIPULATIONS

The parties stipulated to the following which I accepted (Tr. 5-8):

1. This Administrative Law Judge has jurisdiction over this proceeding.

2. The Mathies Mine and Mathies Coal Company are owned and operated by the National Mine Corporation.

3. The Mathies Mine and Mathies Coal Company and National Mine Corporation are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. Citation Number 2939096 and Order Number 2936667 were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time, and place stated therein.

5. Copies of Citation Number 2939096 and Order Number 2936667 are authentic and may be admitted into evidence for establishing issuance.

6. The assessment of a Civil Penalty in this proceeding will not affect the Respondent's ability to continue in business.

7. The annual coal production of Mathies Mine in 1986 was 116,521 tons.

8. There was no intervening clean inspection between June 15, 1987, when Order Number 2940594 was issued and October 6, 1987, when Order Number 2936667 was issued.

9. The printout of the Assessed Violations History Report is a true and accurate history for the Mathies Mine and admissible in the hearing in this matter.

10. There were approximately 686 inspection days at the Mathies Mine in the twenty-four month period prior to the issuance of Order Number 2936667 and Citation Number 2939096.

## ISSUES

The general issues before me concerning these cases are whether the order at bar was properly issued, whether there were violations of the cited standards, and in the case of the order, whether that violation, if it existed, was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as appropriate

civil penalties to be assessed for the violations, should either or both be found.

I. Citation No. 2939096

Citation No. 2939096, issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), alleges a violation of the regulatory standard at 30 C.F.R. § 50.20 and charges as follows: "The operator failed to report the accident that occurred to John Cherok on May 1, 1986 on MSHA Form 7000-1."

30 C.F.R. § 50.20 requires operators to report, inter alia, each occupational injury which occurs at the mine on a Form 7000-1 within ten (10) working days after such an accident resulting in an "occupational injury" to a miner occurs. "Occupational injury" is defined in 30 C.F.R. § 50.2(e) as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job."

The operator does not contest the fact that Mr. Cherok was injured, but disputes whether that injury occurred "at the mine". The point being if he incurred the injury elsewhere, it is not a reportable injury.

The only direct evidence of when, where and how the injury occurred comes from Mr. John Cherok, himself. He testified that on May 1, 1986, while working as a motorman in the supply yard of the Mathies mine, his right foot slipped as he stepped up onto the motor. His right shoe must have had some oil or grease on it he assumes and when he stepped up with his right foot, he slipped off the smooth, metal step and came down off to the left of the motor where his left knee hit the rail. He experienced an immediate sharp pain, but by the time he came out of the mine, it was gradually easing. This injury occurred shortly before Cherok left the mine and he did not report it to anyone prior to his departure. He explains this by stating that because he was working overtime, his shift foreman was already gone and the midnight shift foreman was already inside the mine.

Cherok was not scheduled to work the next day, May 2, and while his knee bothered him somewhat, he did not yet consult a physician. On May 3, the pain increased as the day wore on. By May 4, he could hardly walk and that evening for the first time, he consulted a physician at the Mon Valley Hospital. He was referred to his family physician from there.

Sometime late in the evening of May 4, Cherok for the first time notified the mine operator of the injury to his knee and of the circumstances of its occurrence.

On May 5, 1986, Cherok went to see his family physician and was referred on to a Dr. Frame, an orthopedic specialist. Dr. Frame diagnosed Cherok's injury as a torn collateral ligament with a contusion and sent him to a Dr. Bradley for whirlpool treatments which he received over the following five week period.

Also on May 5, Cherok stopped by the mine and told Tom Hudson, Manager of the Industrial Relations Department that his knee injury had occurred at the mine on May 1 and that he would be off for a while on doctor's orders until his knee healed.

"Medical treatment", which if administered, renders an injury an "occupational injury" and thus reportable to MSHA, is distinguished from "first aid" by 30 C.F.R. § 50.20-3(a) and specifically includes whirlpool treatments.

It is undisputed that Cherok lost work time due to his injury between May 5 and June 6 of 1986. It is also undisputed that Cherok received medical treatment for his injury. Therefore, the only question that remains is whether that injury occurred at the mine. If it did, it is acknowledged that Mathies did not file the required Form 7000-1 within ten (10) working days of the injury as required by the cited regulation.

It is my impression that management at Mathies simply did not believe and does not believe Cherok's version of how he came to be injured. Mr. Dunbar, Mathie's Manager of Safety, opined that based upon his experience with and examination of the type of locomotive which Cherok was operating, the injury to Cherok's knee could not have happened as Cherok claims because of the relative positions of the locomotive's step and the rail upon which Cherok claimed to have fallen.

As Cherok was alone at the time he alleges he was injured, there were no witnesses called by either side to directly corroborate or refute his version of the accident. Therefore, the issue of Cherok's credibility becomes paramount to the critical findings of fact in this case. To begin with, there is no countervailing explanation of how he injured his knee although Mathies seems to suggest that the long weekend of May 2-4 provided ample opportunity for him to do just that. However, there is no evidence to that effect. Furthermore, I do not find Mr. Dunbar's opinion that the accident as described by Cherok was "practically impossible" to be persuasive. I do find that Mr. Cherok's testimony hangs together well and I do credit it. I also find that his actions during the May 1-5, 1986 period were

reasonable with regard to the timing of reporting the situation to Mathies as well as his seeking out medical assistance as the injury became increasingly painful.

Based on the foregoing findings and conclusions, I find that the Secretary has established a violation of 30 C.F.R. § 50.20, as alleged.

Mathies' notion that this citation was issued prematurely in September of 1987 for a May 1, 1986 injury because the operator was initially waiting for the results of a worker's compensation case and after the decision was issued in the claimant's favor, the citation was then issued one day before the time for appealing that ruling had expired is rejected.

I also concur in the "high" negligence finding made by the inspector in this instance. Mathies had all the salient facts available as early as May 5, 1986 had they chosen to believe Mr. Cherok. This was well within the ten working days stipulated by the regulation. But even more telling in this case is the fact they did not report the injury even after receiving the unfavorable workmen's compensation decision in August of 1987, essentially affirming Cherok's version of the accident.

On cross-examination, Mr. Dunbar admitted that the operator has never had any evidence that Mr. Cherok injured his knee in any other way than in the manner in which he described it. That being the case, the operator proceeded at its peril by not filing the required form within the 10 working days time limit prescribed in the regulation should their position not ultimately be upheld.

II. Order No. 2936667

Order No. 2936667, issued pursuant to section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. § 75.400 and charges as follows:

> The operator failed to comply with the clean-up program in the 1LT of 2 West Section MMV 065. As there was accumulation of float coal dust black in color allowed to accumulate in the following locations: (1) From section loading point at 5 + 99 in the No. 1 Entry Return Escapeway extending outby for approximately 600 feet. (2) From 5 + 99 No. 1 Entry entending inby for approximately 600 feet. (3) Also in No. 1 Entry the bleeder entry around the 1LT Section from surveyor station 31 + 20 to 35 + 26. (4) Also in No. 10 Entry bleeder entry from surveyor station 36 + 47 to 41 + 28. The float coal dust was deposited on a rock-dusted

surface of the mine floor for the width of the entry in all locations.

30 C.F.R. § 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

MSHA Inspector Francis Wehr issued the instant order during an inspection of the Mathies mine on October 6, 1987. He was accompanied at the time by Ray Kocik, a Mathies safety inspector and Joseph Delisio, a union safety committeeman.

He observed an accumulation of dry float coal dust in the No. 1 Entry Left Return Escapeway, which is a return escapeway for the 1 Left 2S Section, black in color on the mine floor, approximately 600 feet in length covering the entire width of the entry. In the inspector's opinion, based on his training and experience in the mining industry, this condition would have taken anywhere from 1-3 days to accumulate. The inspector also testified that this area was an active working part of the mine and required a preshift examination for hazardous conditions and violations of the mandatory health and safety standards.

A second area of dry float coal dust accumulation from Surveyor Station 7 + 80 to 5 + 99 in the No. 1 Entry Left Return Escapeway was observed for approximately 200 feet in an active working part of the mine for the width of the entry. This area as well required a preshift examination. In Mr. Delisio's opinion, based on his experience as a preshift examiner himself and his service as a safety committeeman, he estimates this accumulation had existed for a minimum of two days.

The inspector observed a third area of black float coal dust accumulation in the bleeder travel entry from Surveyor Station 31 + 20 to 35 + 26, approximately 400 feet in length and as wide as the entry. The inspector estimated that float dust would have taken a matter of days to accumulate. This particular area requires a weekly examination for methane buildup and to check the bleeder system.

A similiar accumulation of float coal dust was present according to the inspector in the bleeder entry from Surveyor Station 36 + 47 to 41 + 28. The float dust in this area had accumulated in the entire width of the entry and was approximately 500 feet in length. Once again, the inspector

opined it had taken several days to accumulate to that extent and he also testified that this was a weekly examination area.

At the time the subject order was issued, there was a loading crew of eight or nine men preparing to load coal in the 2 West Section MMV 065, and there was electrical equipment in the section as well as a non-permissible coal feeder at 5 + 99. This equipment was as close as 60 or 70 feet away from the left return, although there was no electrical equipment actually in the return.

Mr. Delisio, the union safety committeeman, testified at some length and essentially corroborated Inspector Wehr's testimony on every major point. Specifically, his testimony tracked the inspector's with regard to the extent and color (black) of the float coal dust and the fact that it was dry in most places. He also agreed with the inspector that the violations were obvious.

The operator's main contention and defense in this case is that the float dust accumulations in the four aforementioned cited areas were not black. They were gray and it was not as dangerous a condition as Wehr and Delisio allege it to be. However, as correctly pointed out by the Secretary, the only company witness who observed the first two of the above four areas, the two in the return escapeway prior to the commencement of abatement was Mr. Kocik, and much of his testimony focused on the fact that he felt Inspector Wehr had included both the right and left return escapeways in his closure order. The fact is the right return escapeway was not included in the order and I find the whole point of the testimony largely irrelevant to the inquiry at hand.

No other witnesses saw the two areas in the return escapeway prior to partial abatement of the conditions because as soon as the order was issued, miners began dragging the return entry. It was only after the return entry had been dragged that Messrs. Karaysia and Dunbar observed the conditions extant there, and Mr. Karaysia allowed as how there may have been a violation in the left return entry.

In finding a violation herein of the cited standard, I am making a credibility choice in favor of the testimony of Inspector Wehr and Mr. Delisio over that of Mr. Kocik. I observed the demeanor of these three witnesses at the trial and I believe that all three believe in the truthfulness of their testimony and the justness of their point of view. I also believe, however, that Mr. Kocik has taken the issuance of this particular order as a personal affront and his admitted anger over it has clouded his judgment. In any event, I find the

testimony of the inspector, which is corroborated on every important point by that of Mr. Delisio, to be cogent and credible and I do credit it entirely on the issue of the violation itself.

A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designed significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reaonsably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that Mining Company, Inc., 6 FMSHRC 1573, 1573, 1574-75 (July 1984).

To begin with, it is necessary to differentiate between the two areas in the return escapeway which I conclude represent a "significant and substantial" (S & S) violation of the mandatory standard and the two cited areas in the bleeder which I conclude are not S & S.

might even disagree that a violation existed in the third area of the bleeder (#3 on JX-1) because it was wet in places and not as black as the other three areas. On cross-examination, when asked about ignition sources for the bleeder areas, the following exchange took place at Tr. 123:

> Q. What was the closest electrical equipment or other sources of ignition from the bleeder areas that were cited?
> A. Clear back here (Indicating).
>
> Q. At the face?
>
> A. Yes.
>
> Q. So, was there any significant chance that anything in the bleeder would have been ignited by anything at the working face?
>
> A. Not at that particular time.

Based on the entire record herein, I therefore conclude that the violative conditions in the bleeder areas are not S & S violations.

Conversely, with regard to the two areas in the return escapeway, I find that it was reasonably likely that a spark from the electrical equipment which was at one point only 60 or 70 feet away from the left return could have caused a fire or explosion which in turn could readily have spread to the return escapeway. The accumulated float coal dust in the escapeway would have greatly intensified the fire and it is axiomatic that a wide-spread fire or explosion would lead to a likelihood of serious or even fatal injuries in the mine.

I therefore concur with the opinions of Inspector Wehr and Mr. Delisio that the violation in those two areas was "significant and substantial "and serious.

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply with the mandatory standard, and I agree.

In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable

practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). And most recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997 (1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

There is extensive testimony in the record concerning the amount of time the float coal dust would have taken to accumulate and the additional time the float dust must have been present because mining had not been performed for several shifts at the time the instant order was issued and the fact that the company was required to perform preshift examinations in the two cited areas in the return escapeway and therefore should be chargeable with knowledge of the violative conditions, at the least. Inspector Wehr estimated that the amount of float coal dust he observed in the return escapeway would have taken one to three days to accumulate. This estimate was concurred in by Mr. Delisio. Both Wehr and Delisio also testified to the obviousness of the conditions. As the examinations were mandatory and the conditions were obvious and had been in existence for an extended period of time, Mathies demonstrated aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Accordingly, I conclude that this violation was caused by the operator's "unwarrantable failure" to comply with the cited mandatory standard.

## CIVIL PENALTY ASSESSMENT AND ORDER

In assessing civil penalties in these cases, I have considered all of the foregoing findings and conclusions and the entire record, as well as the requirements of section 110(i) of the Act, including the fact that the operator is large in size and has a substantial history of violations. Under these circumstances, I find that a civil penalty of $300 for the

violation cited in Citation No. 2939096 and $700 for the violation cited in Order No. 2936667 are appropriate.

Citation No. 2939096 and Order No. 2936667 ARE AFFIRMED and the Mathies Coal Company is hereby directed to pay a civil penalty of $1000 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

Anne Gwynne, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania (Certified Mail)

Joseph Mack III, Esq., Thorp, Reed & Armstrong, One Riverfront Center, Pittsburgh, PA 15222 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 23 1989

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| PHYLLIS A. PALMIERI, Complainant | : | DISCRIMINATION PROCEEDING |
| v. | : | Docket No. WEVA 88-305-D |
| | : | MSHA Case No. MORG CD-88-10 |
| SOUTHERN OHIO COAL COMPANY, Respondent | : | |

ORDER OF DISMISSAL

Before: Judge Maurer

By notice issued October 18, 1988, a hearing in the above-captioned proceeding was scheduled to commence on December 21, 1988, at 1:00 p.m., in Morgantown, West Virginia. The complainant, however, failed to appear at the scheduled time and place.

Accordingly, on December 29, 1988, an Order to Show Cause was issued directing the complainant to explain within ten (10) days why she should not be held in default for her failure to appear at the scheduled hearing.

On January 11, 1989, a letter was received from the complainant requesting approval to withdraw her complaint in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. This case is therefore dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

Robert M. Steptoe, Jr., Esq., Steptoe & Johnson, 6th Floor, Union National Center East, P.O. Box 2190, Clarksburg, WV 26302-2190 (Certified Mail)

Phyllis A. Palmieri, Esq., 1115 Washington Ave., Martinsburg, West Virginia 15401 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 25 1989

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| TUNNELTON MINING COMPANY, Contestant | : | CONTEST PROCEEDING |
| | : | Docket No. PENN 88-10-R |
| v. | : | Citation No. 2881390; 9/10/ |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Marion Mine |
| | : | Mine I.D. No. 36-00929 |

DECISION

Appearances: Joseph A. Yuhas, Esq., Ebensburg, Pennsylvania for Contestant;
Evert VanWijk, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania for Respondent.

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for an expedited hearing to challenge the validity of Citation No. 2881390 issued by the Secretary of Labor against the Tunnelton Mining Company (Tunnelton) for one violation of the standard at 30 C.F.R. § 75.305.

The citation, issued pursuant to section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.305 and, as amended, charges as follows: "[a] record of examination of the following main return aircourse, east mains (right left side) second south (right left side) are [sic] not being recorded in the approved book in that these aircourse [sic] are not being examined for hazardous conditions."

The cited standard provides in relevant part as follows:

> In addition to the preshift and daily examinations required by this subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in ... at least one entry of each intake and return

> aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas. ... A record of these examinations, tests and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Since it is undisputed in this case that at least one entry of the cited return air courses was not being examined in its entirety (and no such examinations were being recorded in the examination books) as required by the cited standard, the violation is proven as charged. Even if the entries cited in this case were, as alleged by Tunnelton, considered to be "abandoned areas" within the meaning of 30 C.F.R. § 75.305, and as such subject to inspection on a weekly basis pursuant to that regulation only "insofar as safety considerations permit", there was nevertheless a violation of the standard herein.

In this regard there is no dispute that on the date of the alleged violation there were indeed certain areas of the cited return aircourses that could have been safely inspected. These areas were the designated bleeder examination points and the travelways to those points. According to the undisputed testimony of Inspector George Tercine of the Federal Mine Safety and Health Administration (MSHA) the corresponding examination books maintained by Tunnelton did not reflect that the weekly examinations required by 30 C.F.R § 75.305 were being performed in these areas. While Tunnelton has argued that it had been recording examinations being made at the bleeder examination points pursuant to the requirements of 30 C.F.R. § 75.316, the examinations required by this standard are not as broad as those required under section 30 C.F.R. § 75.305. In addition, as Inspector Tercine observed, there was no record of examinations of the areas going into the bleeder evaluation points being made. Thus in any event the violation of failing to record examinations of the cited return aircourses pursuant to 30 C.F.R. § 75.305 is proven as charged.

Whether the violation was "significant and substantial" depends on whether a discreet safety hazard existed, whether there was a reasonable likelihood that the hazard contributed to would result in injury and whether there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. Secretary v. Mathies Coal Co.,

6 FMSHRC 1 (1984). In this case the testimony of Bruce Bufalini Resident Mining Engineer at the Marion Mine, was undisputed that the areas traveled to the bleeder examination points were safe and maintained in a safe condition. Indeed Inspector Tercine acknowledged that when he traveled in the subject aircourses to the bleeder evaluation points prior to issuing his citation he found those areas safe to travel. I also observe that the Secretary had permitted Tunnelton not to examine at least one entry of each air course in its entirety until only recently i.e. December 1, 1988, requiring instead daily examinations at only the bleeder evaluation points. Under the circumstances I do not find that the Secretary has sustained her burden of proving that the violation herein was "significant and substantial".

ORDER

Citation No. 2881390 is modified to reflect that it is a non "significant and substantial" violation. The citation is however affirmed as modified and this Contest Proceeding is dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Joseph A. Yuhas, Esq., P.O. Box 367, Ebensburg, PA 15931
(Certified Mail)

Evert VanWijk, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104
(Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 26 1989

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| WESTWOOD ENERGY PROPERTIES,<br>Contestant | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. PENN 88-42-R<br>Citation No. 2675834; 10/27/87 |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Respondent | : | Docket No. PENN 88-43-R<br>Order No. 2675835; 10/27/87 |
| | : | Docket No. PENN 88-73-R<br>Citation No. 2675836; 11/14/87 |
| | : | Docket No. PENN 88-74-R<br>Citation No. 2675837; 11/14/87 |
| | : | Docket No. PENN 88-75-R<br>Citation No. 2675838; 11/14/87 |
| | : | Docket No. PENN 88-76-R<br>Citation No. 2675839; 11/14/87 |
| | : | Docket No. PENN 88-77-R<br>Citation No. 2675840; 11/14/87 |
| | : | Docket No. PENN 88-78-R<br>Citation No. 2675861; 11/14/87 |
| | : | Docket No. PENN 88-79-R<br>Citation No. 2675862; 11/14/87 |
| | : | Docket No. PENN 88-80-R<br>Citation No. 2675863; 11/14/87 |
| | : | Docket No. PENN 88-81-R<br>Citation No. 2676577; 11/14/87 |
| | : | Docket No. PENN 88-82-R<br>Citation No. 2676578; 11/14/87 |
| | : | Docket No. PENN 88-83-R<br>Citation No. 2676579; 11/14/87 |
| | : | Docket No. PENN 88-84-R<br>Citation No. 2677901; 11/14/87 |

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| | : | Docket No. PENN 88-85-R |
| | : | Citation No. 2677902; 11/14/87 |
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| | : | Docket No. PENN 88-86-R |
| | : | Citation No. 2677903; 11/14/87 |
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| | : | Docket No. PENN 88-87-R |
| | : | Citation No. 2677904; 11/14/87 |
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| | : | Docket No. PENN 88-88-R |
| | : | Citation No. 2677905; 11/14/87 |
| | : | |
| | : | Docket No. PENN 88-89-R |
| | : | Citation No. 2677906; 11/14/87 |
| | : | |
| | : | Refuse Culm Bank |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 88-148 |
| Petitioner | : | A.C. No. 36-07888-03501 |
| v. | : | |
| WESTWOOD ENERGY PROPERTIES, | : | Refuse Culm Bank |
| Respondent | : | |

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor (Secretary); Joseph Mack, III, Esq., Thorp, Reed and Armstrong, Pittsburgh, Pennsylvania, on behalf of Westwood Energy Properties (Westwood).

Before: Judge Broderick

STATEMENT OF THE CASE

Westwood filed notices of contest challenging the legality of the issuance of 18 citations and one withdrawal order issued by the Secretary's representatives. The Secretary filed a Petition for the assessment of civil penalties for the violations charged in the contested citations. The contested order was issued under section 104(b) of the Act for failure to comply with a citation issued for Westwood's refusal to permit MSHA to enter the site of the facility for the purpose of conducting an inspection. The citations contested in Docket Nos. PENN 88-84-R through PENN 88-89-R, namely citations 2677901, 2677902, 2677903, 2677904, 2677905 and 2677906 have been vacated by MSHA and reissued as citations 2677913, 2677914, 2677915, 2677916,

2677917, and 2677918. The parties have stipulated that the reissued citations shall be considered as contested in these proceedings.

The primary issue in the case is whether Westwood's facility is a mine within the meaning of that term in the Mine Act, and therefore subject to the jurisdiction of MSHA. Pursuant to notice the case was heard in Harrisburg, Pennsylvania on September 20, 1988. Joseph Uholic and Charles Rosini testified on behalf of the Secretary. Charles Ludwigson testified on behalf of Westwood. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. The Facility

Westwood is the owner of a piece of land in Schuylkill County near Tremont, Pennsylvania. A large culm bank or refuse pile is located on the land. The bank is cone shaped, approximately 4500 feet in circumference at the bottom, and 350 feet at the top. It is about 275 feet high. The bank was created as the refuse product of an underground anthracite coal mine and its preparation plant, called Westwood Colliery, which operated from 1913 to 1947. The preparation plant itself was destroyed and its remains became part of the refuse pile. After the underground mine was closed, a company named Manbeck operated a "fine" coal plant, separating fine coal from the waste material and selling it. Manbeck was inspected by MSHA or its predecessor agency.

The culm owned by Westwood contains coal mine refuse, including rock, slate, shale, wood, metal, both ferrous and nonferrous, granite, quartz, pyrite, and a small percentage of coal and other carbonaceous material. (Some authorities limit the term coal to carbonaceous rock which when dried at 100 degrees centigrade should contain at least 50 percent combustible material. See A DICTIONARY OF MINING, MINERAL and RELATED TERMS, U.S. Dept. of the Interior, page 222).

Westwood uses the material in the culm bank as fuel to generate electrical power which is sold to the Metropolitan Edison Company. Westwood engaged a contractor to remove the material from the bank and load it into hoppers where wood and other materials larger than 12 by 12 inches are removed. Metal is removed by means of a magnet and a metal detector. The culm material is then transported to a silo and crushed in two stages to a particle size of one-eighth of an inch. It is then transported to the combuster where it is burned in a process

called a circulating fluidized bed process of combustion. This process results in steam which drives turbines and creates electrical power. The fuel has a BTU content of from 2700 to 4000. The BTU content of anthracite coal ranges from 12,000 to 15,000. After combustion, approximately 65 to 68 percent by weight of the original fuel is removed as ash, and transported to an ash pile.

2. The Inspection

On October 27, 1987, Federal coal mine inspector Joseph Uholic arrived at Westwood's culm bank site to conduct an inspection of the facility. Westwood denied him entry. On October 28, 1987, Uholic returned, accompanied by Inspector Charles Rosini, pursuant to instructions from his supervisor. Westwood informed them that an inspection would not be permitted on the advice of counsel that the operation was not subject to MSHA jurisdiction. Inspector Uholick issued a citation under section 104(a) of the Act, charging a violation of 103(a) of the Act for failure to permit the inspector to enter the mine site. After approximately 40 minutes, the inspector issued a withdrawal order under section 104(b) of the Act for failure to abate the citation. The Secretary then sought an injunction from the United States District Court to require Westwood to permit the inspection. A consent temporary restraining order was issued permitting MSHA inspections until a final adjudication of the issue of jurisdiction by the Review Commission. The inspectors returned to the facility on November 14, 1987, conducted an inspection and issued the other citations which are involved in this proceeding.

The parties have stipulated that since becoming operational in July 1988, Westwood has sustained net losses in its operation. At the time the citations involved herein were issued, the work was being done by the construction contractor and its approximately 30 to 35 employees, but Westwood was in overall control of the worksite. The violations charged in the citations issued on November 14, 1987, are admitted by Westwood (assuming jurisdiction), but it does not stipulate to the significant and substantial designation, nor to the appropriateness of the proposed penalties.

STATUTORY PROVISIONS

Section 3(h)(1) of the Act provides:

> (h)(1) 'coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to

such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

Section 3(i) of the Act provides:

(i) 'work of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storage, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine;

THE MSHA-OSHA INTERAGENCY AGREEMENT

The Mine Safety and Health Administration and the Occupational Safety and Health Administration, both agencies within the U.S. Department of Labor, entered into an agreement on March 29, 1979, "to delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions. . . " The agreement is set out in 44 F.R. 22827 (April 17, 1979). In general the dividing line between MSHA and OSHA jurisdiction is the point where the raw materials arrive at the plant stockpile. The agreement contains a definition and description of "milling", which comes under the Mine Act.

ISSUES

1. Whether the subject culm bank is a mine, and whether Westwood's activities in preparing it for use as fuel in generating electricity is subject to the Mine Act?

2. If Westwood comes under the jurisdiction of the Mine Health and Safety Administration, whether the cited violations were significant and substantial?

3. If Westwood comes under the MSHA's jurisdiction, what are the appropriate penalties for the cited violations?

CONCLUSIONS OF LAW

STATUTORY DEFINITIONS

In ordinary parlance, the culm bank owned by Westwood would not be considered a mine. It is not "an opening or excavation in the earth for the purpose of extracting minerals" (A DICTIONARY OF MINING, MINERALS AND RELATED TERMS, supra, p. 708). Westwood's use of the culm material does not involve the extraction of minerals from their natural deposits in the earth. The statutory definition of a mine, however, is much broader than the generally accepted meaning of the term. It includes "lands, . . . facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground . . . resulting from the work of extracting such minerals from their natural deposits, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals . . ." [Section 3(h)(1)]. The Westwood culm bank clearly resulted from the work of extracting anthracite coal from its natural deposit in the earth. A literal construction of the statutory language would seem to cover Westwood's culm bank. Westwood argues that such a construction is "overly literalistic," and that "as a matter of practical or economic reality," Westwood's operation cannot be considered mining activity. The construction of the statutory language and its application to the subject operation is clearly complicated by the fact that the underground anthricite mine, the operation of which resulted in the culm, has been closed for 40 years. Westwood had no connection with the extraction of the anthracite or the culm from underground. It seems clear that if the anthracite mine continued in operation and the operator disposed of the coal, and at the same time used the culm or waste in the same way that Westwood does to generate electricity, the entire operation would be considered a mine and subject to the Act. Is it significant that Westwood had nothing to do with the coal extraction? Is it significant that the mine has been closed? Does the length of time it has been closed make any difference?

The statute [Section 3(i)] defines the work of preparing coal as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine."

A literal reading of this definition would seem to cover Westwood's operation described in the findings of fact herein. The culm material contains anthracite coal. Westwood breaks, crushes, sizes, stores and loads it in preparation for its use as fuel.

LEGISLATIVE HISTORY

In enacting the 1977 Mine Act Congress clearly intended that its coverage be as broad as possible: "It is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of the Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (Legis. Hist.). The joint explanatory statement of the Committee of Conference refers to the definition of a mine: "Both the Senate bill and the House amendment broadly defined mine to include all underground or surface areas from which the mineral is extracted, and all surface facilities used in preparing or processing the minerals, as well as roads, structures, dams, impoundments, tailing ponds and like facilities related to the mining activity." Legis. Hist. at 1316.

The Secretary of Labor is given the initial responsibility for determining whether a facility is subject to the Mine Act. She is in a unique position to determine the dividing line between MSHA and OSHA jurisdiction, since both programs are administered by her. I assume that the issuance of citations by MSHA to Westwood reflects the Secretary's determination that the subject facility is a mine and therefore is subject to the Mine Act. Although such a determination is not binding on the Commission, it must be accorded great weight in our consideration of the jurisdictional question.

COURTS OF APPEALS AND DISTRICT COURT DECISIONS

The case of Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979) cert. denied, 444 U.S. 1015 (1980), involved a company, Stoudt's Ferry, which purchased material dredged from the Schuylkill River by the Commonwealth of Pennsylvania. Stoudt's Ferry then transported the material to its plant where it separated it into sand and gravel, and a material usable as a fuel. The latter was sold to a utility company as "usable anthracite refuse." The court held that the process of separating the burnable product from the dredged

material brought Stoudt's Ferry within the coverage of the Act. The Court said at page 592: "Although it may seem incongruous to apply the label 'mine' to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it -- the word means what the statute says it means."

In the case of Harman Mining Corp. v. Federal Mine Safety and Health Review Commission, 671 F.2d 794 (4th Cir. 1981), the Court held that railroad "car dropping" activities of a mining corporation, incident to the loading and storage of coal after it had been prepared, took place at a mine and were subject to MSHA jurisdiction, even though the railroad tracks and cars were owned by the railroad and some of the car dropping activities were performed by railroad employees.

The District of Columbia Circuit reversed the Review Commission in Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C. Cir. 1984). The court held that Carolina's slate gravel processing facility which did not extract the slate but "bloated" it, and crushed and sized the resultant product (called "stalite"), and sold it for use in making concrete blocks was subject to the Mine Act. The Court said at page 1552 that the statute "gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference both by the Commission and the courts . . .. In this highly technical area deference to the Secretary's expertise is especially appropriate . . .. The Commission, so far as we can see, gave the Secretary's determination no deference, and we believe that was error."

The term milling is used, at least primarily, with reference to metal mining. See A DICTIONARY, supra, p. 706. It refers to the grinding or crushing of ore, and is ordinarily performed in a mill. The MSHA-OSHA Interagency Agreement defines it a "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives". The analogous process in coal mining is the work of preparing coal. (Compare MILLING AND CRUSHING, U.S. Dept. of Interior, National Mine Health and Safety Academy (1978) with COAL PREPARATION HANDBOOK, U.S. Dept. of Labor, National Mine Health and Safety Academy (n.d.).) It is ordinarily performed in a preparation plant. The Secretary's determination that an activity constitutes the work of preparing coal, like her determination that an activity constitutes milling, is a highly technical matter, and must be accorded deference by the Review Commission.

In Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985), the Court reversed a Commission determination that Old Dominion was subject to MSHA jurisdiction when it maintained an electrical substation on coal mine property. The substation was used to meter the amount of electricity purchased by the mine operator. The court held that Congress intended to exclude electric utilities from Mine act coverage, when the utility's only presence on the mine site is to read the meter and occasionally service its equipment. The Court declined to accord deference to MSHA's interpretation of the statutory grant of jurisdiction.

The United States District Court for the Southern District of Indiana in Donovan v. Inland Terminals, 3 BNA MSHC 1893 (1985), denied the Secretary's motion for a preliminary injunction to prohibit denial of entry to an MSHA inspector. Inland operated a commercial loading dock and stockpiled coal. It utilized loaders, crushers, and hoppers to facilitate its loading operation. The court held, citing the Commission's Elam decision, infra, that the facility was not a mine, and therefore was not subject to the coverage of the Mine Act.

## COMMISSION AND ADMINISTRATIVE LAW JUDGE DECISIONS

In the case of Oliver M. Elam, 4 FMSHRC 5 (1982), the Commission determined that Elam's commercial dock on the Ohio River from which coal and other materials were loaded onto barges was not a mine subject to the Act. Elam's facilities for loading coal included a hopper, a crusher, and conveyor belts. Occasionally large pieces of coal were broken by Elam to pass through the hopper. The crusher then broke the coal into one size in order that it might be carried on the conveyor belts. The Commission looked at the statutory definition of "work of preparing coal," and concluded that "inherent in the determination of whether an operation properly is classified as 'mining' is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities." 4 FMSHRC at 7. "[W]ork of preparing coal connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications." 4 FMSHRC at 8. Elam's work in crushing and sizing coal was performed to facilitate its loading business and not to render the coal fit for any particular use. It therefore was not engaged in the work of preparing coal and did not operate a mine.

Alexander Brothers, Inc., 4 FMSHRC 541 (1982), arose under the 1969 Coal Act. 1/ It involved the reclamation of coal from a refuse pile created during the operation of an underground mine which was closed in 1967. The refuse pile contained coal, rock dust, garbage, timber, wood, steel, dirt, tin cans, bottles, metal and general debris. Approximately 20 to 25 percent of the material taken from the pile was coal. The material was removed from the pile and trucked to a screening plant, where rock and obvious waste were removed. It was then crushed and transported to a cleaning plant. Noncoal was removed by various processes. The resultant coal was then sold to brokers. The Commission determined that Alexander Brothers were engaged in the work of preparing coal. The facts that they had nothing to do with the extraction of coal, and that their work in removing the debris from the coal differed from the ordinary preparation plant did not remove them from the jurisdiction of the Coal Act.

In Mineral Coal Sales, Inc., 7 FMSHRC 615 (1985) coal was delivered to Mineral by brokers. Mineral tested the coal to determine the BTU, ash and sulfur content. It then crushed the coal to a uniform size and loaded it on railroad cars. The Commission held that Mineral's business constituted mining since it stored, mixed, crushed, sized and loaded coal to make it suitable for a particular use.

In the case of VenBlack, Inc. v. Secretary, 7 FMSHRC 520 (1985), Commission Judge Lasher considered whether VenBlack which purchased already prepared coal and converted it into a powdery substance called Austin Black which was then sold to the tire and rubber industry as a chemical additive was subject to the Mine Act. The purchased coal was unique and had to meet VenBlack's specifications. VenBlack pulverized the coal to a fine dust having the consistency of talcum powder. The facility had been purchased from a coal company which operated a coal mine and preparation plant as well as the chemical facility producing Austin Black. The entire operation was inspected by MSHA. The mine and preparation plant had been closed and VenBlack had no connection with the mining property. Judge Lasher concluded that VenBlack was engaged in manufacturing operations, and was not a secondary coal preparation facility. VenBlack did not produce or prepare coal, but, using already prepared coal, manufactured and marketed a chemical additive.

1/ The definitions of "mine" and "the work of preparing the coal" in the 1969 Act did not differ significantly from the definitions in the 1977 Mine Act.

In a case under the Coal Act, Jones and Laughlin Steel Corporation v. MESA, Docket No. PITT 76X198, Chief Administrative Law Judge Luoma of the Department of the Interior decided on February 22, 1977, that a refuse pile on applicant's land was part of a coal mine and subject to the Act. The refuse pile consisted of material taken directly from the mine, such as waste from roof falls, construction material, etc. It apparently was largely slate but contained some coal. The refuse pile was approximately 50 years old and had not been used since 1967. Judge Luoma concluded that the refuse pile was a surface area of the mine, since it was "composed of material which resulted from, the work of extracting coal."

CONCLUSION

Westwood argues that "it is a power plant, pure and simple"; that it utilizes a stockpile of fuel as a conventional power plant would use a stockpile of coal. It consumes fuel and does not produce a marketable mineral. Westwood's argument emphasizes the latter distinction as if the marketing of coal or other mineral is essential to the idea of mining or coal preparation. But it is not uncommon for mine operators to themselves consume the products of their mines. And Westwood does more than burn the culm material; it prepares it "for a particular use." Elam, supra: it extracts the culm from the bank and loads it into hoppers, where certain waste materials are removed; it then transports it on a conveyor belt where ferrous metals are removed by a magnet; thereafter a metal detector seeks other metals which are rejected. The residual fuel is then crushed or sized to particles approximately one quarter inch in size. All this takes place prior to the fuel being introduced into the boiler building. These activities closely resemble the "work of preparing the coal" as defined in the Act.

I am persuaded that the sweeping definition of a coal or other mine in the Act, and the admonition in the Legislative History that the term be given the broadest possible interpretation brings Westwood's facility within its terms. Any doubt that the culm bank is or includes "lands . . . , structures, facilities, . . . or other property including impoundments, . . . on the surface or udnerground, used in, . . . or resulting from the work of extracting such minerals from their natural deposits . . ." must be resolved in favor of coverage.

I am further persuaded that Westwood's use of the culm includes the work of preparing the coal, since it breaks, crushes, sizes, stores and loads anthracite, and does other work of preparing coal usually done by the operator of a coal mine.

In both of these conclusions, I am giving deference to the determination by the Secretary of Labor that Westwood's facility and operation are subject to the Mine Act.

THE VIOLATIONS

1. Denial of Entry

Westwood asserts that its refusal to permit MSHA inspectors to inspect its property was based on a reasonable, good faith belief that it was not subject to the Mine Act. There is no evidence in the record to cast doubt on Westwood's bona fides. Its operation had been previously been inspected by OSHA. Although it refused entry to the MSHA inspectors after the issuance of the citation and a 104(b) order issued for noncompliance, it fully cooperated with the Inspectors after the consent order was issued by the District Court. Nevertheless, the refusal to permit MSHA inspectors to conduct an inspection of the facility was, in view of my conclusion that it was a mine, a serious violation. Westwood was working on a high wall with a significant grade. The conditions of the highwall, the equipment, the training and competence of the employees could not be evaluated without an inspection. I conclude that the violation contributed to a hazard and that there was a reasonable likelihood that the hazard would result in a serious injury or illness. U.S. Steel Mining Company, Inc., 10 FMSHRC 1138 (1988). Although Westwood's denial of entry was deliberate, it acted in good faith. Considering the criteria in section 110(i) of the act, I conclude that an appropriate penalty for the violation is $300.

2. Failure to File with MSHA

Citation 2675836 charges a violation of 30 C.F.R. § 41.11(a) because Westwood failed to submit a legal identification form to MSHA; citation 2675837 charges a violation of 30 C.F.R. § 77.1000 because Westwood failed to submit to MSHA for approval a ground control plan; citation 2676579 charges a violation of 30 C.F.R. § 48.23(a)(1) because Westwood failed to file a training plan with MSHA; citation 2676577 charges a violation of 30 C.F.R. § 77.1712 because Westwood failed to notify the MSHA District Manager prior to beginning operation; citation 2676578 charges a violation of 30 C.F.R. § 77.1713 because the person conducting on-shift inspections had not been certified by MSHA. These violations are all related to Westwood's belief that it was not subject to MSHA jurisdiction. They are not serious since they were not likely to result in, or contribute to, an injury to a miner. I conclude that $20 is an appropriate penalty for each violation.

3. Other Violations not Related to Training Requirements

Citation 2675839 charges a violation of 30 C.F.R. § 77.1710(i) because a bulldozer being used to push bank material on top of the refuse bank was not provided with seat belts. The dozer was being operated on a 30 degree grade and the bank was over 200 feet high. I conclude that the violation contributed to a hazard which was reasonably likely to result in serious injury. Westwood was aware or should have been aware of the hazardous condition. I conclude that an appropriate penalty for this violation is $100.

Citations 2675840 and 2675863 charge violations of 30 C.F.R. § 77.1109(c)(1) because a bulldozer and a loader were not provided with fire extinguishers. The inspector considered the violations nonserious. I conclude that appropriate penalties for the violations are $20 each. Citations 2675838 and 2675861 charge violations of 30 C.F.R. § 77.410 because a loader was not provided with a functioning back up alarm. The inspector considered the violations nonserious. I conclude that an appropriate penalty for each violation is $20. Citation 2675862 charges a violation of 30 C.F.R. § 77.1710(i) because a front end loader was not provided with seat belts. Because the loader was working at the ground level, the inspector considered the violation nonserious. I conclude that an appropriate penalty for the violation is $20.

4. Training Violations

Citations 2677913 through 2677918 (replacing 2677901 through 2677906) all charge violations of 30 C.F.R. § 48.26(a) because six employees had not received training as newly employed experienced miners. The employees had not previously worked on a culm bank, which in the inspector's judgment presented unique hazards. Therefore, the lack of such training contributed to a hazard which was reasonably likely to result in serious injury. The violations were moderately serious. The Secretary failed to establish that the violations were caused by Westwood's negligence. I conclude that $50 is an appropriate penalty for each violation.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. The contested violations and withdrawal order are AFFIRMED;

2. the Notices of Contest are DISMISSED;

3. Westwood shall within 30 days of the date of this decision pay the following civil penalties:

| CITATION | VIOLATION | AMOUNT |
|---|---|---|
| 2675834/835 | 103(a) | $300 |
| 2675836 | 30 C.F.R. § 41.11(a) | 20 |
| 2675837 | 30 C.F.R. § 77.1000 | 20 |
| 2676579 | 30 C.F.R. § 48.23(a)(1) | 20 |
| 2676577 | 30 C.F.R. § 77.1712 | 20 |
| 2676578 | 30 C.F.R. § 77.1713 | 20 |
| 2675839 | 30 C.F.R. § 77.1710(i) | 100 |
| 2675840 | 30 C.F.R. § 77.1109(c)(1) | 20 |
| 2675863 | 30 C.F.R. § 77.1109(c)(1) | 20 |
| 2675838 | 30 C.F.R. § 77.410 | 20 |
| 2675861 | 30 C.F.R. § 77.410 | 20 |
| 2675862 | 30 C.F.R. § 77.1710(i) | 20 |
| 2677913 | 30 C.F.R. § 48.26(a) | 50 |
| 2677914 | 30 C.F.R. § 48.26(a) | 50 |
| 2677915 | 30 C.F.R. § 48.26(a) | 50 |
| 2677916 | 30 C.F.R. § 48.26(a) | 50 |
| 2677917 | 30 C.F.R. § 48.26(a) | 50 |
| 2677918 | 30 C.F.R. § 48.26(a) | 50 |
| | | $900 |

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Joseph Mack, III, Esq., Thorp, Reed & Armstrong, One Riverfront Center, Pittsburgh, PA 15222 (Certified Mail)

Mark V. Swirsky, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 27 1989

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING<br><br>Docket No. KENT 88-133<br>A.C. No. 15-14701-03524 |
| v. | : | Mine No. 2 |
| BOWLING MOUNTAIN MINING CORPORATION Respondent | : | |

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

On December 29, 1988, the Secretary of Labor on behalf of the parties to this action, filed a motion to approve the settlement negotiated between them. At issue in this case are five violations, originally assessed at $9300 in the aggregate. Settlement is proposed at $7000.

The above-refenced violations were discovered as a result of on investigation into a fatal roof fall accident which occurred on September 28, 1987, killing Truman Faulkner, an acting foreman at the mine. More particularly, the operator was cited for a violation of 30 C.F.R. § 75.200 because it failed to provide additional roof support after encountering adverse roof conditions, as required by its roof control plan. Mud seams, indicating adverse roof conditions, had been encountered, but no additional support was ordered set by Faulkner. This negligence contributed to his death. The company was cited for another, separate violation of 30 C.F.R. § 75.200 because the acting foreman, Faulkner, failed to install temporary roof support before working on unsupported roof, also as required by it's roof control plan. The roof fall that killed Faulkner was directly attributable to this violation.

The operator was also cited for not conducting the required pre-shift examination of the mine since September 24, 1987, and more particularly, on September 28, 1987, the day Faulkner was killed. This is a serious violation of 30 C.F.R. § 75.303, although it does not appear as though this violation directly contributed to Faulkner's death.

Additionally, the respondent was cited for a violation of 30 C.F.R. § 48.6, because the operator had not provided newly employed experienced miner training to the deceased miner, Truman Faulkner, although he had been working at the mine for approximately three (3) weeks at the time of his death.

Lastly, the respondent was cited for a violation of 30 C.F.R. § 50.10 because the operator failed to report the roof fall accident which caused the fatal injury to Truman Faulkner. MSHA was notified of the accident by a state mine inspector, but did not receive direct notification from the operator.

The Solicitor states that mining of coal at the mine where the violations occurred has ceased and this mine has now been sealed.

In support of the proposed settlement, the Solicitor further states his belief that approval of this settlement is in the public interest and that the circumstances presented warrant the reduction in the original civil penalty assessments for the violations in question. Further, he has submitted a detailed discussion and disclosure as to the facts and circumstances surrounding the issuance of the citations and orders, as well as a full explanation and justification for the proposed reduction.

I accept the Solicitor's representations and approve the settlements.

ORDER

The operator, and by agreement, Mr. Charles E. McCullah, President and principal stockholder of Bowling Mountain Coal Company, Inc., d/b/a Bowling Mountain Mining Corporation, personally, is ordered to pay $7000 in eight equal monthly installments of $777.77 and one last installment of 777.84, beginning November 1, 1988, and payable by the first day of each month thereafter, until paid in full. Upon receipt of payment in full by the Secretary, this case is dismissed.

Roy J. Maurer
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

David J. Stetson, Esq., Trimble & Mann, 104 N. Kentucky Street, P.O. Drawer 1344, Corbin, KY 40701 (Certified Mail)

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January 27, 1989

| | | |
|---|---|---|
| EMERY MINING CORPORATION AND/OR UTAH POWER & LIGHT COMPANY, Contestants | : | CONTEST PROCEEDINGS |
| v. | : | Docket No. WEST 87-130-R<br>Citation No. 2844485; 3/24/87 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. WEST 87-131-R<br>Order No. 2844486; 3/24/87 |
| and | : | Docket No. WEST 87-132-R<br>Order No. 2844488; 3/24/87 |
| UNITED MINE WORKERS OF AMERICA, (UMWA), Intervenor | : | Docket No. WEST 87-133-R<br>Order No. 2844489; 3/24/87 |
| | : | Docket No. WEST 87-134-R<br>Citation No. 2844490; 3/24/87 |
| | : | Docket No. WEST 87-135-R<br>Citation No. 2844491; 3/24/87 |
| | : | Docket No. WEST 87-136-R<br>Citation No. 2844492; 3/24/87 |
| | : | Docket No. WEST 87-137-R<br>Citation No. 2844493; 3/24/87 |
| | : | Docket No. WEST 87-144-R<br>Order No. 2844795; 3/24/87 |
| | : | Docket No. WEST 87-145-R<br>Order No. 2844796; 3/24/87 |
| | : | Docket No. WEST 87-146-R<br>Order No. 2844798; 3/24/87 |
| | : | Docket No. WEST 87-147-R<br>Order No. 2844800; 3/24/87 |
| | : | Docket No. WEST 87-150-R<br>Order No. 2844805; 3/24/87 |
| | : | Docket No. WEST 87-152-R<br>Order No. 2844807; 3/24/87 |
| | : | Docket No. WEST 87-153-R<br>Order No. 2844808; 3/24/87 |

: Docket No. WEST 87-155-R
: Citation No. 2844811; 3/24/87
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: Docket No. WEST 87-156-R
: Order No. 2844813; 3/24/87
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: Docket No. WEST 87-157-R
: Order No. 2844815; 3/24/87
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: Docket No. WEST 87-158-R
: Citation No. 2844816; 3/24/87
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: Docket No. WEST 87-159-R
: Citation No. 2844817; 3/24/87
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: Docket No. WEST 87-160-R
: Order No. 2844822; 3/24/87
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: Docket No. WEST 87-161-R
: Order No. 2844823; 3/24/87
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: Docket No. WEST 87-163-R
: Citation No. 2844826; 3/24/87
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: Docket No. WEST 87-243-R
: Citation No. 2844828; 8/13/87
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: Docket No. WEST 87-244-R
: Citation No. 2844830; 8/13/87
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: Docket No. WEST 87-245-R
: Citation No. 2844831; 8/13/87
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: Docket No. WEST 87-246-R
: Citation No. 2844832; 8/13/87
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: Docket No. WEST 87-247-R
: Citation No. 2844833; 8/13/87
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: Docket No. WEST 87-248-R
: Citation No. 2844835; 8/13/87
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: Docket No. WEST 87-249-R
: Citation No. 2844837; 8/13/87
:
: Wilberg Mine
: Mine I.D. No. 42-00080

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEST 87-208<br>A.C. No. 42-00080-03578 |
| v. | : | Docket No. WEST 87-209<br>A.C. No. 42-00080-03579 |
| EMERY MINING CORPORATION, and<br>ITS SUCCESSOR-IN-INTEREST<br>UTAH POWER & LIGHT COMPANY,<br>MINING DIV.,<br>Respondent | : | Docket No. WEST 88-25<br>A.C. No. 42-00080-03584<br><br>Wilberg Mine |
| and | : | |
| UNITED MINE WORKERS OF<br>AMERICA (UMWA),<br>Intervenor | : | |

ORDER

1. On August 30, 1988, the undersigned Judge issued an order granting the petition of Utah Power and Light Company ("UP&L") to vacate 30 modified citations and orders to the extent that they named UP&L as a party.

2. On November 19, 1988, the Secretary of Labor (Secretary) filed a petition for interlocutory review of said order.

3. On December 5, 1988, UP&L filed in opposition to the Secretary's petition for interlocutory review, arguing, among other things, that the subject order was not interlocutory but rather a final order, reviewable only upon the filing of a petition for discretionary review in accordance with 30 U.S.C. § 823(d)(2)(A)(i) and Commission Procedural Rule 70, 29 C.F.R. § 2700.70.

4. On December 19, 1988, the Secretary filed a reply to UP&L's opposition, arguing that the subject order was not a final decision because the requirements of Rule 54(b) of the Federal Rules of Civil Procedure were not met. Specifically the Secretary stated that:

> The August 30 Order contains no express determination that there is no reason for delay or express direction for the entry of final judgment as to Utah Power and Light.

5. On January 10, 1989, the Commission granted the Secretary's petition for interlocutory review "for the limited purpose of remanding this matter to the administrative law judge for an expeditious determination of whether a certification of finality in accordance with Rule 54(b) is appropriate."

6. After the above order of remand was received the presiding judge granted the parties an opportunity 1/ to state their position on the issues involved in said order.

7. Emery Mining Corporation (Emery), and Intervenor did not file any statements. On January 24, 1989, the Secretary filed a statement of her position and further incorporated a copy of her reply to UP&L filed before the Commission. UP&L filed a response on January 27, 1989.

Basically, the Secretary contends that the order of August 30, 1988 was interlocutory and not a final decision. In the alternative, the Secretary states that if the order of August 30, 1988 is certified as final, then 30 days from such certification should be provided in order to afford an opportunity for Commission review.

UP&L states for its part that a Rule 54(b) certificate is not necessary and, in the alternative it argues certification of the August 30, 1988 order may be contrary to the principles of judical economy.

## Discussion

In its order of remand and in considering Rule 54(b) of the Federal Rules of Civil Procedure, the Commission concurred with

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1/ Order: January 12, 1989.

the statement in 10 Wright Miller & Kane, Federal Practice and Procedure, Sec. 2654 at 38 (1983) reading as follows:

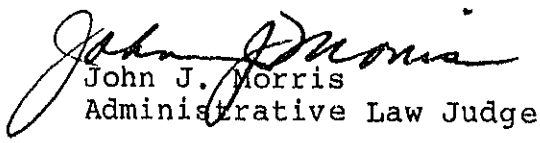
> The rule does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much-needed certainty in determining when a final and appealable judgment has been entered. As stated by one court, "if it does choose to enter such a final order, [the court] must do so in a definite, unmistakable manner." [David v. District of Columbia, 187 F.2d 204, 206 (D.C. Cir. 1950).] Absent a certification under Rule 54(b) any order in a multiple-party or multiple-claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.

The order of remand directs the presiding judge to make "an expeditious determination of whether a certification of finality in accordance with Rule 54(b) is appropriate."

As presiding judge I conclude that a certification of finality is appropriate since the order of August 30, 1988 does not state that it is a final order in a definite, unmistakable manner.

For the foregoing reasons and in accordance with the order of remand, as presiding judge and in accordance with Rule 54(b), F.R.C.P., I find there is no just reason for delay and I certify as to the finality of the order of August 30, 1988.

Further, as presiding judge, I expressly direct the entry of judgment in favor of Utah Power and Light Company in all of the cases listed in the caption.



John J. Morris
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER CO 80204

JAN 30 1989

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|---|---|---|
| EMERY MINING CORPORATION AND/OR UTAH POWER & LIGHT COMPANY, Contestants | : | CONTEST PROCEEDINGS |
| | : | Docket No. WEST 87-130-R |
| | : | Citation No. 2844485; 3/24/87 |
| v. | : | Docket No. WEST 87-131-R |
| | : | Order No. 2844486; 3/24/87 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. WEST 87-132-R |
| | : | Order No. 2844488; 3/24/87 |
| | : | Docket No. WEST 87-133-R |
| and | : | Order No. 2844489; 3/24/87 |
| UNITED MINE WORKERS OF AMERICA, (UMWA), Intervenor | : | Docket No. WEST 87-134-R |
| | : | Citation No. 2844490; 3/24/87 |
| | : | Docket No. WEST 87-135-R |
| | : | Citation No. 2844491; 3/24/87 |
| | : | Docket No. WEST 87-136-R |
| | : | Citation No. 2844492; 3/24/87 |
| | : | Docket No. WEST 87-137-R |
| | : | Citation No. 2844493; 3/24/87 |
| | : | Docket No. WEST 87-144-R |
| | : | Order No. 2844795; 3/24/87 |
| | : | Docket No. WEST 87-145-R |
| | : | Order No. 2844796; 3/24/87 |
| | : | Docket No. WEST 87-146-R |
| | : | Order No. 2844798; 3/24/87 |
| | : | Docket No. WEST 87-147-R |
| | : | Order No. 2844800; 3/24/87 |
| | : | Docket No. WEST 87-150-R |
| | : | Order No. 2844805; 3/24/87 |
| | : | Docket No. WEST 87-152-R |
| | : | Order No. 2844807; 3/24/87 |
| | : | Docket No. WEST 87-153-R |
| | : | Order No. 2844808; 3/24/87 |

: Docket No. WEST 87-155-R
: Citation No. 2844811; 3/24/87
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: Docket No. WEST 87-156-R
: Order No. 2844813; 3/24/87
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: Docket No. WEST 87-157-R
: Order No. 2844815; 3/24/87
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: Docket No. WEST 87-158-R
: Citation No. 2844816; 3/24/87
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: Docket No. WEST 87-159-R
: Citation No. 2844817; 3/24/87
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: Docket No. WEST 87-160-R
: Order No. 2844822; 3/24/87
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: Docket No. WEST 87-161-R
: Order No. 2844823; 3/24/87
:
: Docket No. WEST 87-163-R
: Citation No. 2844826; 3/24/87
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: Docket No. WEST 87-243-R
: Citation No. 2844828; 8/13/87
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: Docket No. WEST 87-244-R
: Citation No. 2844830; 8/13/87
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: Docket No. WEST 87-245-R
: Citation No. 2844831; 8/13/87
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: Docket No. WEST 87-246-R
: Citation No. 2844832; 8/13/87
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: Docket No. WEST 87-247-R
: Citation No. 2844833; 8/13/87
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: Docket No. WEST 87-248-R
: Citation No. 2844835; 8/13/87
:
: Docket No. WEST 87-249-R
: Citation No. 2844837; 8/13/87
:
: Wilberg Mine
: Mine I.D. No. 42-00080

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | : | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEST 87-208<br>A.C. No. 42-00080-03578 |
| v. | : | Docket No. WEST 87-209<br>A.C. No. 42-00080-03579 |
| EMERY MINING CORPORATION, and<br>ITS SUCCESSOR-IN-INTEREST<br>UTAH POWER & LIGHT COMPANY,<br>MINING DIV.,<br>Respondent | : | Docket No. WEST 88-25<br>A.C. No. 42-00080-03584<br><br>Wilberg Mine |
| and | : | |
| UNITED MINE WORKERS OF<br>AMERICA (UMWA),<br>Intervenor | : | |

ORDER

1. In a order issued on January 27, 1989, the undersigned, in accordance with an order of remand of January 10, 1989, certified as to the issuance of a final order as provided in Rule 54(b) of the Federal Rules of Civil Procedure.

2. Further, an order of final judgment was entered in favor of Utah Power and Light Company ("UP&L") in all cases listed in the caption of this order.

3. In certain of the cases listed in the caption the parties are in agreement 1/ that Emery Mining Corporation ("Emery") either did not contest the involved citations (orders), or paid the proposed penalty as originally assessed.

These cases are as follows:

WEST 87-134-R
WEST 87-135-R
WEST 87-136-R
WEST 87-137-R
WEST 87-155-R
WEST 87-158-R
WEST 87-159-R
WEST 87-163-R
WEST 87-243-R
WEST 87-244-R
WEST 87-245-R
WEST 87-246-R
WEST 87-247-R
WEST 87-249-R

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1/ Emery's response filed December 27, 1988; Secretary's response filed January 24, 1989.

4. Inasmuch as a final judgment has been entered as to UP&L in all of the pending cases and inasmuch as Emery either (1) did not contest the citations (orders) or (2) paid the proposed penalty in the cases listed in paragraph 3, there is no issue pending before the presiding judge in these cases and I herewith return said cases to the Docket Office.

John J. Morris
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Thomas C. Means, Esq., Ann R. Klee, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004 (Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, D.C. 20005 (Certified Mail)

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